82-260

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No. 82-260

In the

Supreme Court of the United States

OCTOBER TERM, 1982

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER, AND ZELLA FERN FRAZIER,
Petitioners,

v.

JUDGE OF THE PUTNAM CIRCUIT COURT, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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August 13, 1982

Central Publishing Company, Inc., Indianapolis, IN 46206

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that petitioners were not deprived of a constitutionally protected liberty interest without due process of law solely because after the deprivation had been consummated, the state allowed them to bring suit in its courts for redress, or whether the Court of Appeals should have applied the balancing test set forth in *Matthews v. Eldridge* to determine whether due process had been provided.

2. Whether, in light of *Patsy v. Florida Board of Regents*, the Court of Appeals correctly required petitioners to exhaust their state judicial remedies before bringing suit in federal court under 42 U.S.C. §1983.

3. Whether petitioners, as relatives and long-term *de facto* parents of four children, had a constitutionally protected liberty interest in maintaining the integrity of their families.

When this controversy arose, respondent Francis N. Hamilton was judge of the Putnam County, Indiana, Circuit Court; respondent Glenn Deem was Clerk of that court; respondents Cecil Sutton, Helen Hurst, Donald Crosby, Rita Garrett and Janet Lane were members of the Putnam County Board of Public Welfare; and respondents Gerald V. McCord and Juanita Brooks were the director and child welfare worker, respectively, of the Putnam County Department of Public Welfare. Respondents John and Jane A. Doe, John and Jane B. Doe, John and Jane C. Doe, and John and Jane D. Doe were the adoptive parents of the four Ellis children. The district court denied petitioners' motion to amend the complaint to specifically identify and serve the Doe defendants.

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JUDGE OF THE PUTNAM CIRCUIT COURT, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Amy Frances Ellis, Cyril Victor Frazier, and Zella Fern Frazier respectfully petition the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on February 1, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 569 F.2d 510 and is set out in the Appendix at pages A-3 through A-15. The judgment of the Court of Appeals appears at page A-2.

The order of the Court of Appeals denying petitioners' request for rehearing and suggestion for rehearing *en banc* appears at page A-1.

The judgment and memorandum decision of the United States District Court for the Southern District of Indiana, Indianapolis Division, is unreported. It appears at pages A-15 through A-25.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit were entered on February 1, 1982. On March 31, 1982, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc*.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). This petition is timely filed pursuant to the June 3, 1982, order of Justice John Paul Stevens, granting an enlargement of time under Supreme Court Rule 22, up to and including August 15, 1982.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution reads, in pertinent part:

> "Congress shall make no law . . . abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> ". . . Nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

42 U.S.C. §1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE[1]

The jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1343, to secure redress for the deprivation of petitioners' rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution.

This case concerns the four young children of Larry and Mary Ellis: Twila, Kimberly, Larry Jr., and Delta Dawn.

When the controversy arose in July of 1977, petitioner Amy Frances Ellis had custody of Twila and Delta Dawn. Petitioners Cyril and Zella Frazier, who are husband and wife, had custody of Kimberly and Larry Jr. (R.P. 209)

Amy Ellis is the sister of Zella Frazier, who is Larry's biological mother and adoptive aunt. Although Mrs. Ellis adopted Larry from Mrs. Frazier in 1952, Larry maintained close contact with Mrs. Frazier throughout his life and voluntarily placed two of his children with her on numerous occasions. Welfare records refer to Mrs. Frazier as the children's "grandmother".

The children had resided with petitioners for extended periods since they were born. It is undisputed that petitioners had developed close emotional ties with the children and provided them with good homes. (R.P. 110; Page 8 of Plaintiffs' Exhibit No. 2; R.P. 207-208; R.P. 236-253)

[1]Since the District Court decided the case on respondents' motion for summary judgment, the facts are presented in the light most favorable to the petitioners. *Adickes v. S.H. Kress & Company*, 398 U.S. 144 (1970); *Pollar v. Columbia Broadcasting Company*, 368 U.S. 464, 473 (1962).

In March of 1976, all four children were made wards of the Putnam County Department of Public Welfare and placed in foster care, primarily as a result of Mrs. Ellis' report that Larry and his wife were mistreating them. (R.P. 111-112) Although the wardships were not terminated, the children were returned to their parents three months later. During the next year, the children frequently resided with petitioners. (R.P. 209)

Larry had custody of the children in July of 1977 when he requested permission from the welfare department to place Twila and Delta Dawn with Mrs. Ellis and to place Kimberly and Larry Jr. with the Fraziers. Welfare granted this request and acknowledged in writing that petitioners were to continue caring for the children until Larry made other arrangements. (R.P. 209; 215-216)

Petitioners understood from Larry and from Larry's written agreement with welfare that the children would remain with them on a permanent basis, and wanted them to do so. (R.P. 207-208; R.P. 236-253) The children shared this desire. (R.P. 256-257)

One month later, Mrs. Ellis and the Fraziers each received letters demanding that the children be returned to the welfare department within two days so they could be placed in foster homes. (R.P. 210) There is no evidence that petitioners were not properly caring for the children, or that any emergency existed which required the children's removal. Indeed, no explanation has *ever* been offered for this decision. Neither Mrs. Ellis nor the Fraziers were informed that they had a right to a hearing or to continued custody of the children. Mrs. Ellis was told only that the children were being removed immediately and that she had no choice but to surrender them. The letter was followed by telephone calls the next day. Although Mrs. Ellis and the Fraziers protested the removal, they surrendered the children as ordered. (R.P. 210)

This was the last written communication petitioners ever received about respondents' plans for the children. During the next ten months, when petitioners requested further information, respondents refused to discuss the matter.

After the children were removed, they were sent to a group home in another county.[2] Shortly thereafter, Mrs. Ellis called respondent Brooks about visitation and was told that there was a six-week waiting period. No explanation was offered for this waiting period and no authority for the existence of such a rule was given. Petitioners saw the children in September, October, and November. Before each visit, Mrs. Ellis called Ms. Brooks to make the appointment and asked that the children be returned. Ms. Brooks denied their requests and refused to discuss the matter. (R.P. 211)

Carol Tewksbury is an investigator who interviewed Larry and Joann Willis,[3] two staff members from the group home.

According to the Willises, Twila, Delta Dawn, and Kimberly were placed with them while Larry Jr. was sent to another cottage. When Ms. Brooks delivered the children, she said that the children had been living with their grandparents, who were fine people, and that the children had been well cared for. Ms. Brooks said that these children were an "unusual" case. (R.P. 255)

The children were extremely upset because they had been taken from their grandparents and Kim sobbed much of the time. Mrs. Willis watched the girls become more and more unhappy while they were at the home. She said that

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[2]There is evidence that at least some of the children were sexually molested at the home. (R.P. 257-258)

[3]Affidavits were not available from these persons, in that they had terminated their employment and their whereabouts were unknown. (R.P. 254)

they expressed only love for their grandparents and that when they said their prayers they would ask to go home to their grandparents. (R.P. 256)

Twila and Kim eagerly awaited their grandparents' visits. On the first visit Kim begged her grandparents not to leave, and both girls were always extremely sad when they did. The children received frequent letters from the Fraziers, which were opened by the home before delivery. (R.P. 257)

Twila was removed from the home on December 13, 1977, and petitioners have had no contact with her since that date. The welfare department refused to tell petitioners where she was placed and denied them any opportunity to contact her.

Kimberly was removed on December 21, 1977, and petitioners were not told where she was or permitted to contact her until shortly before oral argument in the Court of Appeals.[4] (R.P. 212)

Petitioners continued visiting Delta Dawn and Larry Jr. at the group home between January and March of 1978. In April the children were relocated and the welfare department refused to tell petitioners where they were placed. Petitioners have had no contact with either child since that date. (R.P. 212-213)

After Twila and Kimberly had been removed from the home, petitioners wrote them every week, but were required to take their letters to Ms. Brooks' office unsealed.

[4]The Court of Appeals allowed petitioners to supplement the record on appeal by showing that Kimberly had been removed from her current adoptive parents and placed in a group home because the adoptive parents were abusing her. The Hon. William C. Vaughn, III, Judge Hamilton's successor, allowed the Fraziers to intervene in the neglect action and granted them limited visitation rights.

The children, however, were not allowed to write back. On April 3rd, Ms. Brooks stated, without explanation, that petitioners could no longer write to the children. (R.P. 213)

Judith Kirtland, Esq., began representing petitioners in May of 1978,[5] and went to Ms. Brooks' office to ask about the children. Ms. Brooks took Ms. Kirtland to see Judge Hamilton, who stated that the children had been removed because the petitioners did not want them. (R.P. 170-171)

When Ms. Kirtland told Judge Hamilton that petitioners wanted custody of their grandchildren, Judge Hamilton "informed me that he knew what was best for the children of Putnam County, that he did not like outsiders coming in and telling him or his welfare department what should be done with children in Putnam County, and that he would not approve any legal efforts by my clients to regain the care and custody the children". Judge Hamilton further stated that if petitioners did not cease trying to regain the children, he would have them adopted by persons living far away. (R.P. 170-171)

Thereafter, Ms. Kirtland prepared petitioners' pleading to adopt the children and presented it to respondent Deem, the Clerk of the Putnam Circuit Court, along with a check for the filing fee. Deem stated that all adoption petitions were filed with the judge and refused to accept it. Ms. Kirtland went to Judge Hamilton's office and gave the petition to his secretary. The secretary file-marked it and assigned a cause number. (R.P. 170, 176-178)

She then took it into the judge's office, returned, and informed Ms. Kirtland that she had been instructed not to accept it because "a single petition incorporated the

[5]Ms. Kirtland is an Indianapolis attorney who works with the Indiana Civil Liberties Union. Petitioners began seeking legal advice early in 1978, but could not find an attorney in Putnam County who would take their case.

pleadings regarding all four children". She stated that Judge Hamilton wanted a separate petition for each child, but referred to no other defects. (R.P. 171)

The judge's secretary opened a file drawer and showed Ms. Kirtland petitions from other cases. One of these was a single petition seeking the adoption of more than one child, which was "hurriedly" returned to the file folder. Ms. Kirtland was allowed to examine several other petitions to determine the nature of the allegations which they contained. None contained the allegations which Judge Hamilton later required Ms. Kirtland to include in the petitions for the Ellis children. (R.P. 171)

Ms. Kirtland prepared four separate adoption petitions, one for each child, and returned them to Judge Hamilton along with a check for the filing fee. (R.P. 171-172, 180-189) Thereafter, he wrote and demanded that she redraft the petitions to include all of the information required on the State Board of Health birth certificate form.[6] Although the letter was dated July 25th, Ms. Kirtland did not receive it until the second week in August because it had been mailed in an envelope with insufficient postage. (R.P. 172, 190-193)

On August 24th, Ms. Kirtland sent a third set of petitions to Judge Hamilton along with a check for the filing fee. (R.P. 194-204)

On August 28th, Judge Hamilton wrote Ms. Kirtland, acknowledged receipt of the petitions, and returned them without action because the Ellis children had been adopted by other persons. (R.P. 172-173, 205-206) Larry was adopted on August 11th, Delta Dawn on August 15th,

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[6]There is no statutory, common law or administrative authority requiring this information in the petition, and other Indiana courts allow the birth certificate form to be completed after the adoptions are granted. (R.P. 263-264)

Kimberly on August 22nd, and Twila on August 25th. (R.P. 115-116) Each child was adopted by a different couple after Ms. Kirtland attempted to file petitioners' first pleading on July 18th. (R.P. 130-150) Neither petitioners nor their attorney had notice that these other adoption petitions were pending.

These facts show that Judge Hamilton deliberately refused to accept petitioners' adoption pleadings because he and respondent Brooks wanted more time to find other adoptive parents and that neither he nor the welfare department intended to consider petitioners' adoption pleadings on their merits.[7]

In his affidavit in support of summary judgment, Judge Hamilton stated that the petitioners' first petition was "deficient in many ways and did not comply with the rules of this court nor in my opinion, with the laws of the State of Indiana" and that Ms. Kirtland's attempts to file the petition with the clerk violated a long-standing rule of court which required that adoption petitions be filed with the court reporter. (R.P. 114-116)

Judge Hamilton's attorney acknowledged that these local rules were not written (R.P. 153-154), and oral rules of court have no legal significance under Indiana law. *McDonald v. State*, 172 Ind. 393, 88 N.E. 673 (1909); *Indiana Trial Rule* 81.

In response to Judge Hamilton's allegations, Ralph Ogden, Esq., filed an affidavit stating that he had helped draft Indiana's current juvenile and paternity laws, and

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[7]It is significant that in their affidavits in support of summary judgment, respondents neither explained nor attempted to justify what they had done. They did not even state that they were acting in the children's best interests. Since they refused to comply with petitioners' repeated discovery requests, it can only be inferred from their silence that they had no good reason at all.

that he was the staff attorney for an interim study committee of the Indiana General Assembly which was redrafting the adoption statutes. In his private practice, Mr. Ogden handled a variety of adoption matters before the Marion County and other state courts, and was familiar with the procedures and practices of those courts. (R.P. 261-263)

Copies of two adoption petitions, one filed in the Marion County Superior Court, and one filed in the Knox County Circuit Court, were attached to his affidavit. Both petitions had been approved by the courts in which they were filed. Neither contained the information which Judge Hamilton required Ms. Kirtland to include, and one of them involved three siblings who were wards of the welfare department. It had no consents attached or referenced. (R.P. 263; 265-271)

After learning that the children had been adopted by strangers, petitioners filed their complaint in the district court and sought injunctive relief and monetary damages under 42 U.S.C. §1983. (R.P. 6-11)

Petitioners sought injunctive relief against all of the defendants to set aside the adoptions, to set aside any other court actions which had separated petitioners from their grandchildren, to prevent further interference with petitioners' family lives, and to secure immediate visitation with the children.[8]

Petitioners demanded monetary damages from each of the welfare defendants for their unconstitutional

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[8]At the hearing on summary judgment, petitioners dismissed their claim to have the adoptions set aside because they believed it would do the children more harm than good to separate them from their new parents after so much time had passed. *See, Stout v. Tippecanoe County Department of Public Welfare*, ___ Ind. App. ___, 395 N.E.2d 444, 453, n. 14 (1979).

intrusions into their family lives and for destruction of their relationships with their grandchildren. They also demanded monetary damages from the Clerk of the Putnam Circuit Court for refusing to file their adoption petitions, thereby denying them access to state courts.

In November of 1979, at the court's request, respondents moved for summary judgment. (R.P. 102, 104) This motion was granted on December 19, 1980, when judgment was entered against all of the plaintiffs on all of the claims in their complaint. The court also filed a memorandum which included findings of fact and a discussion of the law which it deemed controlling. (R.P. 276-285; Appendix, pages A-15 through A-25)

The district court failed to address the events which led up to the children's adoptions, and concluded in general terms that petitioners should have appealed Judge Hamilton's various decisions, that the decisions of Judge Hamilton and the welfare department were lawful, and that petitioners' relationships with their grandchildren were legally and forever severed by the children's adoptions.

This decision was appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the district court on February 1, 1982. (Appendix, pages A-3 through A-14)

Petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc* which was denied on March 31st, and this petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Decision Creates a Rigid and Simplistic Rule for Deciding Whether Due Process Has Been Satisfied and is Therefore Contrary to this Court's Holding in *Matthews v. Eldridge*

The Court of Appeals held that due process was satisfied solely because Indiana allowed petitioners to bring suit in its courts to remedy a constitutional deprivation already committed by respondents. Certiorari should be granted because this ruling is contrary to controlling precedent of this Court and because it conflicts with decisions of other federal courts of appeal in the following respects:

1. It replaces the three part balancing test of *Matthews v. Eldridge*, 424 U.S. 319 (1976) with a simplistic approach which considers only one factor: whether a citizen was allowed to bring suit in state court to remedy the wrong.

2. It eliminates the requirement for a pre-deprivation hearing initiated by the government.

3. It eliminates the fundamental requirement that the government give notice to the citizen against whom it proposes to act.

4. It shifts the burden of persuasion from the state to its citizens, *e.g.*, it requires the citizen to prove that the government's actions were impermissible, rather than requiring the government to show that its conduct is proper in the first instance.

The Seventh Circuit relied upon the conclusions reached in *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Ingraham v. Wright*, 430 U.S. 651 (1977), for the proposition that due process was satisfied whenever the state allowed its citizens to sue in its courts for the redress of constitutional

wrongs committed by state officials.[9] In focusing exclusively upon this one issue to determine whether due process has been provided, the court adopted an inflexible rule which obviates the need for the balancing test articulated in *Matthews v. Eldridge, supra.*

Under this test, the factors which must be weighed and balanced in determining whether due process has been satisfied are:

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[9]*Parratt* and *Ingraham* are distinguishable on five grounds: (1) Here, there is no difficulty in predicting that removing children from their homes, terminating contact between them and their families, and erecting permanent barriers to reuniting the families will *invariably* result in serious constitutional deprivations. "[T]he 'fact-specific' nature of the determination presents a grave risk of erroneous deprivation" by giving welfare workers unbridled discretion to act without proper review. *Duchesne v. Sugarman*, 566 F.2d 817, 828, n. 26 (2nd Cir. 1977) In *Parratt* and *Ingraham*, the deprivation was *not* predictable. (2) It was not "impracticable" to hold a pre-deprivation in this case, as it was in both *Parratt* and *Ingraham*. Indeed, the cost and administrative burden here would not be significantly different regardless of when the hearing was held. The hearing is likewise practicable because the government's intrusion into a constitutionally protected area was planned in advance. Neither negligence of prison officials nor the use of excessive punishment on school children is "planned" in the same sense. (3) The rights considered in *Parratt* and *Ingraham* are qualitatively different from those asserted here. (4) Even if post-deprivation remedies here could restore the status quo, something which petitioners vigorously denied in the Court of Appeals, any delay between the commission of the wrong and undoing it caused petitioners to suffer irreparably from being deprived of their grandchildren and caused the grandchildren to suffer irreparably from the uncertainty and dislocation. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972). These psychic injuries cannot be undone by the stroke of a judicial pen which returns the children long after they were removed, and they cannot be adequately paid for with money. (5) After considering the factors specified in *Matthews v. Eldridge, supra*, the Court held in *Parratt* and *Ingraham* that state *tort* remedies were all the process that was due. There was a general concern in both cases that federal courts were becoming "small claims" courts and that 42 U.S.C. §1983 was being converted into a substitute for state tort actions. Neither danger is present in this case.

"...first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 424 U.S. 334-335.

The same analysis was employed by this Court long before *Matthews* was decided. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). It has also been applied in every due process case considered by the Court since *Matthews*, including *Parratt v. Taylor*, and *Ingraham v. Wright*, *supra*.

The balancing test is necessary because "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, *supra*, 367 U.S. at 895, and because due process is a flexible process which "[c]alls for such procedural protection as the particular situation demands", *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). It represents "a profound attitude of fairness between man and man and more particularly, between the individual and government." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 162-163 (1951) (Frankfurter J., concurring)

Stanley v. Illinois, *supra*, held that "...all Illinois parents are constitutionally entitled to a hearing on their fitness *before* their children are removed from their custody." *Id.* at 405 U.S. 658 (emphasis added). The Court of Appeals' holding that due process is satisfied even though the children are removed *without* a hearing directly conflicts with this Court's holding in *Stanley*.

It is also in sharp conflict with the Second Circuit's decision in *Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977), which is identical to the case at bar in all essential factual particulars except that it was brought by the children's mother. *Duchesne* held that

> "...the state cannot constitutionally sit back and wait for the parent to institute judicial proceedings. It cannot...[adopt] for itself an attitude of 'if your don't like it, sue.' *Kimbrough v. O'Neil*, 523 F.2d 1057, 1060, n. 3 (7th Cir. 1975) (Swygert, J., concurring) The burden of initiating judicial review must be shouldered by the government. We deal here with an uneven situation in which the government has a far greater familiarity with the legal procedures available for testing its action. In such a case, the state cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uniformed in legal intricacies may allow to go unchallenged for a long period of time. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 83 n. 13, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 385, n. 4 (2d Cir. 1973) (Timbers, J., concurring) Nowhere is the inadequacy of the state's approach more poignantly demonstrated than in the present case where the mother did not obtain legal advice until....some 27 months after the initial removal of the children, her rights and those of her children to live together as a family were denied with impunity. Therefore, we must conclude that the failure of appellees to obtain judicial ratification of their decision to maintain custody of the children, despite the numerous and vociferous requests of Ms. Perez for their return, constituted a violation of due process." (Footnote omitted) *Id.* at 566 F.2d 828.

Accord: *Roe v. Conn*, 417 F.Supp. 769 (M.D.Ala. 1976); *Sims v. State Department of Public Welfare*, 438 F.Supp.

1179 (S.D.Tex. 1977) (three judge court), *rev'd. on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979). *See, also, Bell v. Burson*, 402 U.S. 535 (1971); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly, supra.*

Respondents' only communication with petitioners regarding removal of the children was their abrupt letter of August 16, 1977, which demanded that petitioners surrender the children on August 19th.[10]

It cannot be seriously argued that this gave petitioners the constitutionally required notice of the state's plans to permanently remove the children and sever all contact between them and petitioners. Indeed, in light of respondents' letter to the children's father one month earlier, in which they promised to leave the children with petitioners until *he* made other arrangements, the removal was at best an ambiguous gesture.

Because the Court of Appeals did not consider the absence of notice to the petitioners, the practical effect of its ruling is to give judicial sanction to summary governmental action and the elimination of the notice requirement in every instance.

Every state, including Indiana, requires its welfare authorities to prove parental unfitness before removing a child.[11] This rule is consistent with our common law

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[10]The entire text of the letter is: "Have the Ellis children in the office of the Department of Public Welfare on the morning of 8-19-77 so they may be placed in homes. Do nothing to upset them in the meantime." (Exhibit "A" to Affidavit of Zella Fern Frazier In Opposition to Summary Judgment)

[11]Many states, including Indiana, also require welfare authorities to show that removal is the least restrictive alternative consistent with protection of the child; none allow removal simply because someone else would make a better parent. *Cf. Smith v. Organization of Foster Families for Equality and Reform* ("OFFER"), 431 U.S. 816, 863 (1977) (concurring opinion of Stewart, J.) In the case at bar, respondents have

(Footnote continued on following page)

tradition and with constitutional mandate. *Speiser v. Randall*, 357 U.S. 513 (1958); *Stanley v. Illinois*, *supra*; *Duchesne v. Sugarman*, *supra*; *Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir. 1977); *Roe v. Conn*, *supra*; and *Sims v. Texas Department of Public Welfare*, *supra*. *See, also, Santosky v. Kramer*, ___ U.S. ___ (No. 80-5889, decided March 24, 1982); *Addington v. Texas*, 441 U.S. 418 (1979); *In re Winship*, 397 U.S. 358 (1970); *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276 (1966); and *Chaunt v. United States*, 364 U.S. 350 (1960).

Nonetheless, the Court of Appeals allowed respondents to shift the burden of proof to petitioners by acting summarily in the first instance and requiring petitioners to bring suit to set aside their unconstitutional intrusion into petitioners' family lives. As plaintiffs in state court, petitioners would have had the burden of proving that the state acted improperly, even though the burden of justifying their conduct would have rested with the welfare authorities had a hearing been held at the state's instigation before the deprivation.

The Seventh Circuit thus gave judicial approval for the government to summarily remove children without notice or hearing, and rewarded such gross misconduct by allowing the improper removal to shift the burden of persuasion. *Armstrong v. Manzo*, 380 U.S. 545 (1965), the authorities cited above, and fundamental fairness prohibit such a result.

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never argued that petitioners were unfit to have custody of the children; indeed the record shows that such an allegation could not have been proven because it simply wasn't true. If the petitioners were fit parents, as the record shows, welfare's interest in caring for their children is *de minimus* and welfare "spites its own articulated goals" by removing them. *Stanley v. Illinois*, *supra*, at 405 U.S. 652, [illegible]9.

B. The Court of Appeals' Decision Requiring Petitioners To Exhaust Their State Judicial Remedies Conflicts with the Principals of *Patsy v. Florida Board of Regents*

Petitioners were deprived of a constitutionally protected liberty interest when respondents summarily removed the children without notice or hearing. Because there were no exigent circumstances which would justify a summary removal, the deprivation was accomplished without affording petitioners due process of Law.[12] Petitioners and the children suffered irreparable harm the moment the children were removed, and that harm continues for as long as they remain separated. *Stanley v. Illinois, supra.* Any action which petitioners took after the removal could only have been in the form of a *remedy*: it was not a substitute for the process due them prior to the deprivation, it could not undo the wrong, and it could never adequately compensate them or the children for what was done. *Stanley v. Illinois, supra; Duchesne v. Sugarman, supra.*

By thus requiring petitioners to pursue a *remedy* in state courts, the Seventh Circuit required petitioners to exhaust their state remedies.

At least two other federal courts have addressed the exhaustion question in this same context, and are in sharp disagreement with the Seventh Circuit. See, *Haygood v. Younger*, 527 F.Supp. 808, at 813-815 (E.D. Cal. 1981)

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[12]In both *Ingraham* and *Parratt, supra*, the common law tort remedy was all the process that was due. However, where state officials seek to remove children from long-term *de facto* parents, who are wholly suitable custodians and who are joined to the children by mutually strong emotional ties, a post-removal hearing, at the parents' instigation, is surely not all that due process requires. *See, e.g., Stanley v. Illinois; Duchesne v. Sugarman; Roe v. Conn*, and *Sims v. State Department of Public Welfare, supra. See also*, Justice Blackmun's concurring opinion in *Parratt*, at 451 U.S. 545.

(appeal pending, No. 824,285, 9th Cir.) and *Wakinekona v. Olim*, 664 F.2d 708 (9th Cir. 1981), *cert. granted*, No. 81-1581, June 1, 1982, where Judge Canby noted:

> "It is true that there is general language in the majority opinion in *Parratt* suggesting that where a deprivation occurs because a state fails to follow its procedure rather than because it follows its procedure, and there is a state court remedy, then the state has provided all the process that is due. 101S.Ct. at 1917. But this statement must be read in the context in which it was made, that of a tortious deprivation of property for which the state provides a tort remedy. A broader reading that would apply to the present case would remit all §1983 cases to state courts whenever the conduct complained of violated state law as well as the federal Constitution. The result would be to read into §1983 a requirement of exhaustion that has consistently been rejected by the federal courts.[1] *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 481, 5 L.Ed.2d 492 (1961); *Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979), *cert. denied*, 445 U.S. 962, 100 S.Ct. 1648, 64 L.Ed.2d 237 (1980); *Canton v. Spokane School District*, 498 F.2d 840 (9th Cir. 1974).
>
> "1. It is also clear that *Parratt* cannot be read as holding that a state court remedy for a violation of the fourteenth amendment itself provides all the process that is due. The problems with such a circular proposition are insurmountable. Section 1983 actions may be brought in state court. *Martinez v. California*, 444 U.S. 277, 283-84, n.7, 100 S.Ct. 553, 558, n.7, 62 L.Ed.2d. 481 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1., 100 S.Ct. 2502, 2503 n.1, 65 L.Ed.2d 555 (1980). State courts are obligated to enforce applicable federal law. U.S. Const. art. VI, cl. 2. By entertaining §1983 actions, a state court consequently provides a remedy for state deprivation of any federal right. To say that such a remedy provides all the process that is

due from a state would be to deprive the federal courts of primary enforcement of federal rights. *Parratt* of course evinces no such intention." *Id.* at 664 F.2d 714-715.

Exhaustion is contrary to the express holding in *Patsy v. Florida Board of Regents*, ___ U.S. ___ (No. 80-1874, decided June 24, 1982), which reaffirmed the holding of *Monroe v. Pape*, 365 U.S. 167 (1961), that:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought to and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in federal court." *Id.* at 365 U.S. 183

The decision of the Court of Appeals conflicts with this non-exhaustion rule, and should be reversed.

C. This Case Presents an Opportunity to Determine Whether Relatives Acting as Long-Term *De Facto* Parents Have a Constitutionally Protected Liberty Interest in Maintaining the Integrity of Their Families

This Court has long recognized that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 539-640 (1974). There is a "private realm of family life which the state cannot enter" *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and the Constitution "...protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494 at 504-505 (1977) (plurality

opinion). *And see, Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois; Smith v. OFFER;* and *Santosky v. Kramer; supra.*[13]

Neither this Court nor the lower federal courts have articulated precise definitions of "family" or "parent".[14] It is clear that married parents and their children constitute a family and are entitled to the full panopoly of procedural and substantative due process protections against state interference. *Meyer v. Nebraska; Pierce v. Society of Sisters, Prince v. Massachusetts;* and *Smith v. OFFER, supra.* The same is true for parents of "illegitimate" children. *Stanley v. Illinois, supra; Caban v. Mohammed*, 441 U.S. 380 (1979).

The question presented by this case is whether relatives acting as long-term *de facto* parents with consent of the natural parents have the same or similar constitutional rights as the natural parents.[15] In *Smith v. OFFER, supra,*

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[13]Lower federal courts have also applied these principles to a variety of situations involving family life and childrearing. *See, generally, Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977); *Jech v. Burch*, 466 F.Supp. 714 (D.Hawaii 1979); *O'Brien v. Tilson*, 523 F.Supp. 494 (E.D.N.C. 1981); *Roe v. Conn, supra; Sims v. State Department of Public Welfare, supra; Drollinger v. Milligan, supra.*

[14]The Court of Appeals noted a lack of precedent to provide guidance on this point. See Appendix at page A-9; *Ellis v. Hamilton*, 669 F.2d 510, at 513 (7th Cir. 1982).

[15]Because it found that there had been no denial of due process under any circumstances, the Court of Appeals did not address the question. The court noted, however, that at least as to Mrs. Ellis, it would be "reluctant to conclude that a great-aunt, an adoptive grandmother, and a *de facto* mother and father all rolled up into one does not have a liberty interest sufficiently like a parent to support an action under Section 1983." Appendix at page A-9; 669 F.2d at 513.

the Court noted that "The scope of these rights extends beyond natural parents. The 'parent' in *Prince* itself, for example, was the child's aunt and legal custodian." *Id.* at 431 U.S. 843, n. 49. Likewise, in *Pierce v. Society of Sisters, supra*, at 268 U.S. 534-535, the court referred to "the liberty of parents *and guardians* to direct the upbringing and education of children under their control." (emphasis added)

The plurality opinion by Justice Powell in *Moore v. City of East Cleveland, supra*, discusses the importance of extended family members in caring for children when parents are unable to do so, and notes that "...unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Id.* at 431 U.S. 501. That family choice was the decision of a grandmother to live with and care for her grandchild.

And in *Drollinger v. Milligan, supra*, the court held that "The nuclear family has traditionally constituted the unit afforded the protection of due process. We see no reason, however, not to extend this guaranty to the grandfather-grandchild relationship." *Id.* at 552 F.2d 1227.

Petitioners have found no contrary authority in the federal decisions.[16]

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[16]At least one state court has held that because "...recognition of family relationships and reciprocal interests and responsibilities is so interwoven in the fabric of the law...next of kin, such as this grandmother, do have some dormant or inchoate right or interest in the custody and welfare of children who become parentless." *Wilson v. Family Services Division*, 554 P.2d 227 (Utah 1976). By statute or judicial decision, nearly all of the fifty states allow grandparents to petition for visitation even after the parents have been separated by

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This Court has also implied the existence of a liberty interest in foster family relationships. *Smith v. OFFER, supra*, noted that:

> "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals." (footnotes omitted) *Id.* at 431 U.S. 844.

Drummond v. Fulton County Department of Family & Children's Services, 503 F2d. 1200 (5th Cir. *en banc* 1977), held that because foster care relationships created by the state were understood by the foster parents to be temporary, and because they could, under state law, be

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divorce. For representative cases and statutes, see *In the Interest of J. R.*, 315 N.W.2d 750 (Iowa 1982) (grandparents have statutory right to intervene in termination proceedings); *Iowa Code Ann.* §598.35; *People v. Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049 (1981) (grandparent has right to visit with grandchild even after grandchild has been adopted); *Johnson v. Fallon*, 181 Cal.Rptr. 414 (Cal.App. 1982) (grandparents have visitation rights even after adoption); *Hawkins v. Hawkins*, 102 Ill.App. 3d 1037, 430 N.E.2d 652 (1981) (grandparents have right to petition for visitation); *Looper v. McManus*, 581 P.2d 487 (Okl.App. 1978); *Commonwealth ex rel. Williams v. Miller*, 254 Pa. Super. 227, 385 A.2d 992 (1978); *Krieg v. Glassburn*, ___ Ind.App. ___, 419 N.E.2d 1015 (1981) (Tr. denied); *Ind. Code* §31-1-11.7; *Conn.Gen.Stat.Ann.* §46b-59; *Fla.Stat.Ann.* §61-13(2)(b); *Mo.Ann.Stat.* §452.400 (Vernon); *Wash.Rev.Code Ann.* §26.09.240; *Wis.Stat.Ann.* §767.245 (4); *Ohio Stat.Ann.* §3109.05; *Ga. Code Ann.* §38-129; *N.J.Stat.Ann.* §9:2-7.1; *N.C.Gen.Stat.* §50-13.5(j); *Utah Code Ann.* §30-5-1; *Ark.Stat.Ann.* §34-1211.1; *Nev.Stat.Ann.* §123.123; *N.M.Stat.Ann.* §40-9-1; *Va.Code* §20-107.2; *W.Va.Code* §48-2-15; *Mont.Stat.Ann.* §40-9-102.

terminated at will, the foster parents had no liberty interest in continued custody. The court was careful to note that its "conclusion does not necessarily control every 'foster family' situation, but only those in which a child placement agency charged with custody of a child places that child for temporary care. Other situations will have to be addressed on a case by case basis." *Id.* at 563 F.2d 1207.

In *Keyees v. Tippecanoe County Department of Public Welfare*, 600 F.2d 693 (7th Cir. 1979), the Seventh Circuit adopted the Fifth Circuit's reasoning in *Drummond*, but noted that "certainly, where a biological relationship exists, the power of the state to regulate activity is limited." *Id.* at 600 F.2d 697. *Accord: Sherrard v. Owens*, 484 F.Supp. 728 (W.D.Mich. 1980), *aff'd.*, 644 F.2d 542 *(6th Cir. 1981), cert. denied*, ___ U.S. ___ (1981).

Petitioners differ from the foster parents in these cases in four respects: (1) Petitioners are related to the children and the children's parents by both blood and adoption, and in the case of Mr. Frazier, by marriage; (2) Petitioners' strong emotional ties and close-knit family relationships with the children arose out of these blood and adoptive relationships, and not out of any agreement with the state. Indeed, petitioners were important figures in the children's lives for nine years before the welfare department intruded. (3) Because petitioners were caring for the children with the express consent of the children's parents, there was no tension between their claims and the claims of the parents;[17] and (4) Petitioners had every expectation that their custodial relationships with the

[17]Nor was there any tension between petitioners' claims and the interests of the children. It is undisputed that petitioners were providing the children with good homes, that strong bonds of mutual affection existed between petitioners and the children, and that the children suffered grievously from the separation.

children would continue as long as they provided them with good homes.[18]

In *Rivera v. Marcus*, 533 F.Supp. 203 (D.Conn. 1982), a case which is factually indistinguishable from this one, the Court evaluated a foster care relationship in which the mother's half-sister had cared for the children, with the mother's consent, for over two years before the state became involved. For the same reasons which distinguish the case at bar from *OFFER*, *Keyees*, *Drummond*, and *Owens*, *supra*, the court held that the foster mother had a liberty interest in maintaining the integrity of her *de facto* nuclear family.

By granting certiorari to consider the petitioners' claims, this Court can determine the extent to which petitioners and other relatives like them have a liberty interest in maintaining the integrity of their *de facto* nuclear families. Although this issue was left undecided by *Smith v. OFFER* and *Moore v. City of East Cleveland*, *supra*, four lower federal courts and the Court of Appeals below have held or suggested that it should be decided in petitioners' favor. *See, Drollinger v. Milligan; Drummond v. Fulton County Department of Family & Children's Services; Keyees v. Tippecanoe County Department of Public Welfare; Sherrard v. Owens*, and *Rivera v. Marcus*, *supra*.

The Court's determination of this issue will also allow it to fully address the petitioners' claims that they were deprived of a fundamental liberty interest without due process of law. *Cf. Matthews v. Eldridge*, *supra*.

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[18]The welfare department had this same expectation. In their letter of July 8th to the children's parents, respondents Brooks and McCord agreed that the children would remain with petitioners until the parents made other arrangements, which the parents never chose to do.

CONCLUSIONS

For the reasons set forth above, the Court should grant the petition for a writ of certiorari to review the erroneous decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

MARCH 31, 1982

Before

HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD A. POSNER, *Circuit Judge*
HON. HUBERT L. WILL, *Senior District Judge**

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER, and ZELLA FERN FRAZIER,	) Appeal from the) United States District) Court for the) Southern District) of Indiana,
Plaintiffs-Appellants,	) Indianapolis Division.
No. 81-1079 vs.	) No. IP 78-700-C
FRANCIS N. HAMILTON, et al.,	) JAMES E. NOLAND,) *Judge.*
Defendants-Appellees.	)

ORDER

On March 8, 1982, plaintiffs-appellants Amy Frances Ellis, Cyril Victor Frazier, and Zella Fern Frazier, filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the petition. The petition is therefore DENIED.

*Of the Northern District of Illinois.

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

FEBRUARY 1, 1982

Before

HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD A. POSNER, *Circuit Judge*
HON. HUBERT L. WILL, *Senior District Judge**

AMY FRANCES ELLIS, ZELLA FERN FRAZIER and VICTOR FRAZIER,	) Appeal from the) United States District) Court for the) Southern District
Plaintiffs-Appellants,	) of Indiana,) Indianapolis Division.
No. 81-1079 vs.	) No. IP 78-700-C
FRANCIS N. HAMILTON, et al.,	) JAMES E. NOLAND) *Judge.*
Defendants-Appellees.	)

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

*Of the Northern District of Illinois.

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1079

AMY FRANCES ELLIS, ZELLA FERN FRAZIER AND VICTOR FRAZIER,

Plaintiffs-Appellants,

v.

FRANCIS N. HAMILTON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP 78-700-C—James E. Noland, *Judge.*

ARGUED JANUARY 12, 1982—DECIDED FEBRUARY 1, 1982

Before WOOD and POSNER, *Circuit Judges*, and WILL, *Senior District Judge.**

POSNER, *Circuit Judge.* This is a suit under 42 U.S.C. §1983 for injunctive relief and damages against several welfare and judicial officers (including a judge) in Putnam County, Indiana. The plaintiffs claim that their rights under the due process clause of the Fourteenth Amendment were violated by these officers in connection with proceedings that led to the plaintiffs' grandchildren (as we shall call them without meaning thereby to prejudge their status, which is contested) being removed from the plaintiffs' homes and adopted by strangers. The district court granted summary judgment for the defendants.

*Of the Northern District of Illinois.

The plaintiffs are Amy Ellis, her sister Zella Frazier, and Zella's husband Cyril Frazier. Mrs. Frazier is the natural mother, and Amy Ellis the aunt, of Larry Ellis. In 1952 Mrs. Ellis adopted Larry with the consent of Mrs. Frazier. The adoption extinguished Mrs. Frazier's parental rights and vested them in her sister. Mr. Frazier is not Larry's father or otherwise related to him. He married Zella long after she had given up Larry for adoption.

Larry grew up and got married. Between 1969 and 1974 four children were born to the marriage. Larry and his wife were unsatisfactory parents, however, and the children lived for long stretches of time with Mrs. Ellis and Mrs. Frazier. In 1975 Mrs. Ellis complained to the defendants that Larry and his wife were mistreating the children. Her complaint led to criminal charges being lodged against Larry and his wife for cruelty and neglect. An order was entered removing the children from their parents' custody and placing them in a foster home, but the parents later regained custody, and were living with the children in Mrs. Ellis' home when, in July 1977, the mother decamped. Larry thereupon told the defendants that he wanted two of the children to remain with Mrs. Ellis and the other two to live with Mrs. Frazier. Larry took the two children to Mrs. Frazier's house and then disappeared.

The facts narrated up to this point are undisputed, but now the plaintiffs' and the defendants' versions begin to diverge. Since the complaint was dismissed on summary judgment, we must accept the plaintiffs' version of the facts to the extent that they are supported by the affidavits submitted to the district court.

The plaintiffs say that the defendants initially acquiesced in Larry's proposal to place the children in the homes of Mrs. Ellis and Mrs. Frazier, and that the plaintiffs thereby acquired legal custody of the children.

One month later the defendant welfare officers ordered the plaintiffs, on two days' notice and without any explanation, to surrender the children to them. They placed the children in a totally unsuitable—in fact, notorious—group foster home where the female children were subjected to sexual abuse. When the plaintiffs complained, the welfare officers took the children out of the group home and placed them with foster parents but refused to tell the plaintiffs who the foster parents were or where they lived. The children were heartbroken at the separation from their grandparents and would have preferred to live with them.

The plaintiffs eventually retained a lawyer, who in May of the following year inquired of the defendant welfare officers about the children. The welfare officers, fearing that the lawyer would begin proceedings for the adoption of the children by Mrs. Ellis and Mrs. Frazier, filed in June a petition with the defendant judge to terminate the parental rights of Larry Ellis and his wife. Because their whereabouts were unknown, notice of the proceedings was by publication in the local newspaper. No effort was made to notify the plaintiffs specifically, but their lawyer knew about the proceeding. A hearing was held on June 25, 1978, and the judge ordered the parental rights of Larry and his wife terminated. Neither the plaintiffs' lawyer nor any of the plaintiffs was at the hearing.

The termination cleared the way for the children to be adopted, and the plaintiffs set about trying to adopt them. But their lawyer was given the runaround by the defendant court officers, who offered niggling and specious objections to the formal adequacy of the petition for adoption. As a result she was forced to file a second, and on August 24 a third, petition. A few days later the defendants informed her that the children had already been adopted by others. The adoptions (each child was adopted by a different couple) had taken place after the plaintiffs' lawyer filed the

first petition, and neither she nor the plaintiffs had actual or constructive notice of the adoption proceedings. The adoptions robbed the plaintiffs not only of their hopes of adopting the children themselves but also, it seemed, of any right ever to see them again, for the defendants told the plaintiffs that it would be up to the adoptive parents to decide whether to permit the plaintiffs to visit with the children.

This suit was brought three months after the plaintiffs discovered the adoptions, and originally sought to nullify them; but after the suit had been pending for two years the plaintiffs decided that it would do more harm than good to the children to separate them from their new parents. All that the plaintiffs are now seeking in this action is a decree granting them visitation rights and damages for the deprivation of the custody and companionship of the children that they would have enjoyed but for the actions of the defendants. The plaintiffs have not been permitted to visit the children since they were removed from the group home.

We have no doubt that if welfare caseworkers, acting so precipitately as to prevent any recourse to the protective legal machinery of the state, barged into a couple's home, seized their children, sequestered them in a secret place, and put them up for adoption without notifying the parents, they would be guilty of violating 42 U.S.C. §1983, no matter how regular the adoption proceeding on its face. We do not think any exotic constitutional doctrine—not even the ubiquitous oxymoron "substantive due process"—would be necessary in order to reach that result. It is plain to us that the "liberty" protected by the due process clause of the Fourteenth Amendment includes the right to the custody of one's minor children and that it would be a deprivation of that liberty without due process of law for persons acting under color of state law permanently to separate the

children from their parents without notice and hearing. We have to decide how close this case is to that one.

The plaintiffs are of course not the parents of Larry Ellis' children; we are not sure quite what to call them. Cyril Frazier's relationship to the children is particularly tenuous. Having married their grandmother after she had given up Larry for adoption, Cyril is neither a natural nor an adoptive grandfather of Larry's children nor even, if there is such a thing, a "stepgrandfather." Mrs. Frazier is the children's natural grandmother but she voluntarily relinquished any prospective legal rights in Larry's children when she put him up for adoption. The interest of a natural grandmother in grandchildren born long after their parent was adopted away seems too tenuous to be part of the liberty protected by the due process clause.

Mrs. Ellis' claim to have a constitutionally protected liberty interest is the strongest, but we are not sure that even it should be accepted. There is first the question whether adoptive and natural grandparents should be equated. Cases such as *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972), where the Supreme Court held that a father has a liberty interest in the custody of his illegitimate child, point to a biological rather than jural concept of the family, while *Smith v. Organization of Foster Families*, 431 U.S. 816, 843-44 n. 49 (1977), en route to holding that foster parents have at least an arguable liberty interest, contains language that points the other way. In the hypothetical case with which we began, it would probably make no difference whether the parents were natural or adoptive. Adoptive parents have all the legal rights, and generally the same emotional stake, in their children as natural parents. We are less sure it should make no difference in a case involving grandparents.

Passing this objection to Mrs. Ellis' claim, we reach the more fundamental question whether even a natural

grandparent's interest in the society of her grandchildren, though an interest rooted in powerful emotions, is a liberty interest under the due process clause. If the grandchildren are in their parents' custody, the answer probably is no. In such a case the grandparents could not maintain an action in tort for the injury or death of any of the grandchildren under Indiana law, see Ind. Code §34-1-1-8, or so far as we know that of any other state, see, e.g., *Solomon v. Harman*, 107 Ariz. 426, 489 P.2d 236 (1971). It would be odd if the threshold for triggering a federal tort action under section 1983 were lower.

A more difficult question is presented where, as here, the grandchildren are not in the parents' custody. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), heavily relied on by the plaintiffs, is surely relevant, but it does not control this case even if we treat the plurality opinion as stating the view of the whole Court. That case involved the constitutionality of a zoning ordinance that prevented a grandmother from living with her grandson. In striking down the ordinance the Court was concerned with the impact on the family unit as a whole—that is, with the interests of the child as well as of the grandparent. See *id.* at 504-06. Although the plaintiffs here believe that the children would have been happier in their custody, the emphasis of the lawsuit is on their loss, their anguish, rather than the children's.

Drollinger v. Milligan, 552 F.2d 1220, 1226-27 (7th Cir. 1977), in this circuit, was a case where a grandfather offered to provide a home to his daughter, who was on probation, and her daughter (his granddaughter). This court held that grandparents have rights enforceable in section 1983 actions. But *Drollinger* is not necessarily the last word on the question even in this circuit. The opinion devotes only a footnote to the question whether grandparents have rights protected by the due process

clause (*id.* at 1227 n.6), and addresses *adoptive* grandparents' rights not at all.

Despite the absence of compelling authority for holding that grandparents, whether natural or adoptive, ever have a liberty interest under the due process clause, we draw back from concluding that they never do. Like the grandmother in the *Moore* case, Mrs. Ellis during much of the lives of these unfortunate children took the place of totally inadequate parents. We do not want to romanticize her role unduly. Our narration of the facts was, as we said, based on the plaintiffs' own evidence, which naturally paints Mrs. Ellis in a rosy hue and was contested. The defendants have known the entire family intimately for many years and may have had excellent reasons for wanting to keep the children out of Mrs. Ellis' hands (such as her age—she was 69 in 1978). But on this appeal we must disregard that possibility and accept as true that Mrs. Ellis was *in loco parentis* to these children when the defendants took them away from her; and we are reluctant to conclude that a great-aunt, an adoptive grandmother, and a *de facto* mother and father all rolled up into one does not have a liberty interest sufficiently like that of a parent to support an action under section 1983. *Prince v. Massachusetts*, 321 U.S. 158, 159, 166 (1944), after all, equated an "aunt and custodian" to a parent, though without discussion and very possibly inadvertently. Mrs. Ellis was a great-aunt who claims to have had formal custody of the children when the defendants took them from her home in July 1977. Although it seems clear that the interest *prospective* adoptive parents have in the children they are seeking to adopt is not a liberty interest, and the plaintiffs here were that, they were also more; as custodians, they might well have had a right of action if the children had been tortiously injured or killed while living with them in July 1977, see Ind. Code §34-1-1-8; Love, *Tortious Interference with the*

Parent-Child Relationship, 51 Ind. L.J. 590, 621-22 (1976); cf *Villafane v. Banner*, 87 Misc.2d 1037, 387 N.Y.S.2d 183 (Sup. Ct. N.Y. County 1976), though noncustodial grandparents, as we noted earlier, would not have such a right.

Assuming that Mrs. Ellis (and perhaps, though this is more doubtful, the Fraziers as well) had a liberty interest in the society of her grandchildren, we must consider whether, if the facts are viewed in the light most favorable to her, the defendants deprived her of that interest without due process of law. The plaintiffs do not challenge the formal adequacy of Indiana's adoption law (Ind. Code §§31-3-1-1 *et seq.*) because it does not entitle grandparents to notice of a proceeding to terminate parental rights over or to adopt their grandchildren or because it does not allow grandparents to intervene in an adoption proceeding. See *Krieg v. Glassburn*, 419 N.E.2d 1015, 1020 (Ind. App. 1981). These are typical features of adoption law. See, e.g., *Barriner v. Stedman*, 580 P.2d 514, 517-18 (Okla. 1978); but cf. *Wilson v. Family Services Division*, 554 P.2d 227 (Utah 1976) (giving grandparents a right to be heard in an adoption proceeding). Rather, the plaintiffs' complaint is that the defendants unreasonably deprived them of the society of the children in 1977 after Larry Ellis gave them up, and then stymied their efforts to obtain custody of the children by adoption.

We shall grant the plaintiffs—though only for the sake of argument, since the facts have not been determined—that the defendants' conduct was captious, pettifogging, and underhanded throughout. We shall grant them also that their failure to appear at the termination hearing is irrelevant even though they had notice of it, because the judge was determined to deprive them of the custody of the children regardless of anything they or their lawyer said at the hearing. We agree with them that the defendants insult

the syllogism by arguing that the termination of Larry's parental rights automatically severed any right that Mrs. Ellis might have had over the children, because that right ran to her through Larry. The argument makes her earlier and wholly praiseworthy act of reporting Larry's mistreatment of the children to the defendants the fulcrum on which she is levered out of court. We shall also grant the plaintiffs that the defendants committed many errors of Indiana law in processing the plaintiffs' adoption petition.

But with all this conceded to the plaintiffs a denial of due process of law has not been established. If due process were denied every time local officials blundered, then any plaintiff in state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings—unless the defendants act with such ruthless speed that the machinery of correction cannot be brought into play in time.

Therefore, if by design or in effect Indiana law placed the plaintiffs completely at the mercy of county welfare and judicial officers who misbehaved as alleged in the complaint, these allegations would raise a serious due process question. But instead the law of Indiana provides a variety of remedies by which to correct, and promptly, this kind of misbehavior. The remedies available to these plaintiffs included habeas corpus when the welfare officers removed the children from Mrs. Ellis' home, see, e.g., *Risner v. Risner*, 243 Ind. 581, 189 N.E.2d 105 (1963); mandamus when the judge refused to allow them to file their own adoption petition, see Ind. Code §34-4-18-2; cf.

State ex rel. Palmer v. Circuit Court of Hendricks County, 244 Ind. 297, 192 N.E.2d 625 (1963); an action based on fraud to enjoin the adoption away from the plaintiffs, see, e.g., *Caley v. Lung*, 257 Ind. 116, 271 N.E.2d 891 (1971); and a petition for visitation rights, see *Krieg v. Glassburn*, *supra*, 419 N.E.2d at 1019 (expressly permitting grandparents to petition for visitation rights). The plaintiffs could also have refused to surrender the children when the defendants directed them to do so. This would have forced the defendants to use legal process, which the plaintiffs could have resisted in the Indiana courts. They did none of these things but instead brought this federal suit and by doing so made it impossible for the courts of Indiana to prevent the defendants' alleged misconduct.

We do not say that a section 1983 plaintiff must exhaust his state remedies before he can proceed in federal court. That would imply that if the plaintiffs here had assiduously but unsuccessfully pursued their remedies under Indiana law we could not reject their federal claims without a trial. The point, rather, is that there is no denial of due process if the state provides reasonable remedies for preventing families from being arbitrarily broken up by local domestic relations officers such as the defendants in this case. The courts of Indiana seem every bit as determined to prevent such wrongs as the federal courts would be. See *Matter of Adoption of Hewitt*, 396 N.E.2d 938 (Ind. App. 1979); *Matter of Joseph*, 416 N.E.2d 857 (Ind. App. 1981). Indeed, despite their dilatoriness, the plaintiffs in the present case still have remedies they can pursue under Indiana law. A motion by the plaintiffs to supplement the record on appeal advises us that in November of last year the Putnam County welfare board filed a petition in the county court charging the adoptive parents of one of the plaintiffs' grandchildren with abuse and neglect of the child. The Fraziers have moved to intervene in the case and

their motion is pending before that court. They have also moved the court, successfully, to order the child examined by a competent psychiatrist. These developments deepen our sympathy for their unfortunate family and bolster the plaintiffs' contention that the defendants have mishandled the whole business. But they also show that the plaintiffs really did, and still do, have remedies under Indiana law.

The approach we take here, which considers the adequacy and availability (not exhaustion) of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law, is not a novelty in either property cases, see *Parratt v. Taylor*, 451 U.S. 527 (1981), or liberty cases, see *Ingraham v. White*, 430 U.S. 651, 676-82 (1977), under 42 U.S.C. §1983. It is the approach taken by the Sixth Circuit in *Huynh Thi Anh v. Levi*, 586 F.2d 625, 632-34 (6th Cir. 1978), a case much like this one. A grandmother and uncle were seeking, though by a petition for habeas corpus rather than an action under 42 U.S.C. §1983, to wrest custody of their grandchildren-nephews from the foster homes where the state's welfare and judicial officers had put them. The court held not only that state remedies had not been exhausted as required in habeas corpus cases, but also that there was no denial of due process, because the state remedies that were available to the plaintiffs were adequate. (The court bypassed the question whether the plaintiffs had a liberty interest to begin with. See *id.* at 632.)

The approach is appropriate in family-law cases because of the peculiarly local nature of that law. We are well aware that the Supreme Court has made inroads in recent years into this once secure preserve of states' rights. No longer can it be said that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890). Yet recognizing

that family law is peculiarly local, the federal courts continue to adhere tenaciously to the judge-made rule that excepts most domestic relations cases from the diversity jurisdiction. See, e.g., *Solomon v. Solomon*, 516 F.2d 1018, 1024 (3d Cir. 1975). The relief sought in this case illustrates, if the point is not sufficiently obvious, why the federal courts are not the right tribunals to decide custody cases. The plaintiffs want a decree giving them the right to visit with the children periodically. The decree would require continuous judicial supervision and adjustment until the last child was grown up—feasible and familiar tasks for a local domestic relations judge but not for a remote, and in these matters totally inexperienced, federal district judge. The plaintiffs' damage claim does not present this problem, but damages are rarely an adequate remedy in a custody case; if we thought these plaintiffs were just after money we would doubt the good faith of their suit.

In noting that the plaintiffs apparently can still pursue certain remedies under Indiana law, we of course do not mean to prejudge the plaintiffs' rights under that law. And in holding that the due process required by the U.S. Constitution has not been denied them, we of course do not mean to prejudge any federal claims that the plaintiffs may acquire as a result of the conduct of the defendants in the ongoing proceedings in the Indiana courts relating to the custody of the children.

One question remains to be considered—whether the district court should have let the plaintiffs amend their complaint to add various allegations. Perhaps so (the court gave no reasons for its refusal); but the additional allegations are minor and would not, if taken to be true, change our conclusion that the judgment must be, and it is, affirmed. The motion to supplement the record on appeal, not being opposed, is granted.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER and ZELLA FERN FRAZIER	)	
VS.	)	NO. IP 78-700-C
FRANCIS N. HAMILTON, as Judge of the Putnam Circuit Court, GLENN DEEM, as Clerk of the Putnam Circuit Court; CECIL SUTTON, HELEN HURST, DONALD CROSBY, RITA GARRETT, and JANE LANE, as Members of Putnam County Board of Public Welfare; GERALD V. MCCORD, individually and as Director of the Putnam County Department of Public Welfare; JUANITA BROOKS, individually and as Child Welfare Worker for the Putnam County Department of Public Welfare; JOHN and JANE DOE, JOHN and JANE B. DOE, JOHN and JANE C. DOE, and JOHN and JANE D. DOE, adoptive parents of the Ellis children, whose identities are presently unknown to plaintiffs and their counsel	)	

JUDGMENT ENTRY

This cause came before the Court upon the motion of the defendants for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Whereupon the Court, having considered the motion and the memoranda and materials submitted in support thereof and opposition thereto, having conducted a hearing in the matter, and having granted the defendants' motion by an order and entry attached hereto, hereby finds that there is no just cause for delay and ENTERS JUDGMENT in favor of the defendants and against the plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by way of their complaint against the defendants. Costs are to be borne accordingly.

DATED this 19th day of December, 1980.

/s/ JAMES E. NOLAND, Judge
JAMES E. NOLAND, U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER and ZELLA FERN FRAZIER	)	
vs.	)	NO. IP 78-700-C
FRANCIS N. HAMILTON, as Judge of the Putnam Circuit Court, GLENN DEEM, as Clerk of the Putnam Circuit Court; CECIL SUTTON, HELEN HURST, DONALD CROSBY, RITA GARRETT, and JANE LANE, as Members of Putnam County Board of Public Welfare; GERALD V. MCCORD, individually and as Director of the Putnam County Department of Public Welfare; JUANITA BROOKS, individually and as Child Welfare Worker for the Putnam County Department of Public Welfare; JOHN and JANE DOE, JOHN and JANE B. DOE, JOHN and JANE C. DOE, and JOHN and JANE D. DOE, adoptive parents of the Ellis children, whose identities are presently unknown to plaintiffs and their counsel	)	

ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The above entitled cause of action originated with a complaint filed on behalf of the plaintiffs on November 3, 1978. The plaintiffs complained of violation of rights secured by the Civil Rights Act of 1871, as set forth in 42 U.S.C. §1983, alleging that they have been deprived of such rights through conspiracy to deprive them of equal protection of the law, the Bill of Rights and the Fourteenth Amendment.

This controversey arises from the adoption of four children as approved by the Judge of the Putnam Circuit Court. Plaintiffs seek a preliminary injunction setting aside the adoption of each of the four Ellis children, previously approved by the Circuit Court, and returning said children to the care and custody of the plaintiffs.

The plaintiffs are Amy Ellis, grandmother of the four children by virtue of the adoption of Larry Ellis, father of said children. The plaintiff, Zella Frazier is the natural mother of Larry and the sister of Amy Ellis. The plaintiff, Cyril Frazier is the husband of Zella Frazier. The legality of said adoption of Larry Ellis is not contested.

Various motions have been filed in this cause and the Court now overrules the plaintiffs' motion to file an amended complaint herein, dated October 9, 1979. It is unnecessary to rule upon the motions to dismiss filed upon behalf of the plaintiffs (sic) since this cause of action is now proceeding on the defendants' motions for summary judgment filed December 17, 1979, and plaintiffs' response thereto.

This matter came on for hearing and argument on the

27th day of October, 1980, and various affidavits were submitted in evidence. The defendants in this cause are all officials of Putnam County having to do with the adoption proceedings of the four Ellis children (each child having been adopted by separate parents), and are identified as follows:

Francis N. Hamilton, Judge of the Putnam Circuit Court,
Glenn Deem, Clerk of the Putnam Circuit Court,
Cecil Sutton, Helen Hurst, Donald Crosby, Rita Garrett and Janet Lane, Members of the Putnam County Board of Public Welfare,
Gerald V. McCord, Director of the Putnam County Department of Public Welfare,
Juanita Brooks, Child Welfare Worker, Putnam County Department of Public Welfare.

The Court now sets out the following material facts surrounding the adoption proceedings as to the four Ellis children and finds that there is no genuine issue as to said material facts.

The plaintiff, Amy Frances Ellis, adopted Larry Donovan Ellis in 1952, which adoption was consented to by her sister, Zella Frazier, the natural mother of Larry.

Cyril Frazier asserts any claim as the husband of Zella Frazier.

After the marriage of Larry Ellis and his wife Mary, they had four children: Twila Gail, born April 25, 1969 (now age 11 years); Kimberly Ann, born September 19, 1970 (now age 10 years); Larry Donovan, II, born October 13, 1973 (now age 7 years); and Delta Dawn, born January 30, 1974 (now age 6 years).

In November 1975, the plaintiff Amy Frances Ellis complained to the Judge of the Putnam Circuit Court and to the Department of Public Welfare alleging mistreatment of the four children by her adopted son and his wife.

Pursuant to her complaint, the Putnam County Department of Public Welfare conducted an investigation which subsequently resulted in criminal charges being filed against Larry Ellis and his wife Mary for cruelty and neglect of children.

At the hearing on said charge held March 22, 1976, the plaintiff Amy Frances Ellis was the State's prosecution witness and at the conclusion of the evidence, the Court took the matter under advisement and ordered said children removed from the home of the natural parents and placed in a foster home.

At the time of these proceedings, Larry Ellis and his wife Mary were residing with the four children in the home of the plaintiff Amy Frances Ellis.

After a period of time, Larry Ellis obtained employment and regained custody of the four children.

The children continued to reside in the home of their natural parents until the mother abandoned the home and Larry Ellis, on July 8, 1977, appeared before the Judge of the Putnam Circuit Court with a representative of the Putnam County Department of Public Welfare and specifically requested that two of the children be placed in the home of Amy Frances Ellis and two of the children be placed in the home of Zella Frazier.

Thereafter, plaintiff Amy Frances Ellis made numerous calls to both the Putnam Circuit Court and the County Department of Public Welfare complaining that she was unable to take care of the children because of her age and health and asking that the children be placed in a more suitable home.

Thereafter, the children were removed from the homes of Amy Frances Ellis and Zella Frazier and were placed in the homes of the prospective adoptive parents.

Preliminarily to the adoption of the four children, the County Department of Public Welfare on June 5, 1968, (sic) filed a petition with the Putnam Circuit Court to terminate the parental rights of Larry and Mary Ellis and obtain notice as to said parents by publication, since their whereabouts were unknown either to the plaintiffs or to the defendants.

On June 30, 1978, the Putnam Circuit Court granted the petition of the County Department of Public Welfare terminating the parental rights of Larry and Mary Ellis to their four children. Such proceedings complied in all respects with Indiana law. The plaintiffs had due notice thereof but failed to appear. At this point, the four children became wards of the County Department of Public Welfare.

Following the termination of the parental rights of Larry and Mary Ellis, the four children were placed in the homes of prospective adoptive parents. Contemporaneously, the plaintiffs in this cause secured counsel and attempted on or about July 18, 1978, to file a petition for adoption providing for two of the children to be adopted by Amy Frances Ellis and two of the children to be adopted by Cyril and Zella Frazier. At this point the record is not clear and it is disputed as to what transpired between counsel for the plaintiffs and the defendant, Francis N. Hamilton, Judge of the Putnam Circuit Court and other court representatives. Counsel for plaintiffs allege that the plaintiffs' petitions for adoption were unlawfully rejected by the Putnam Circuit Court and therefore contend plaintiffs did not have an opportunity to proceed in the case for adoption of the four Ellis children as was their constitutional right.

During the pendency of the filing controversy, the

defendant adoptive parents, (referred to herein as the respective Does), proceeded with their petitions for adoption having received the consent of the County Department of Public Welfare. This consent was necessary since the four children were wards of said agency. Thus, court action upon the petitions for adoption by the four sets of adoptive parents were considered and acted upon by the Circuit Court Judge, all during the period of time that counsel for the plaintiffs were attempting to get their petitions for adoption filed and considered.

Between August 11, 1978, and August 25, 1978, each of the four petitions for adoption were (sic) granted. Said adoption proceedings complied with the Indiana law.

It is also significant to note as undisputed, that plaintiffs would have had to obtain a consent to adoption by the County Department of Public Welfare, which consent had already been given for adoption to the four sets of prospective adoptive parents. Furthermore, if plaintiffs intended to protest court proceedings in regard to the four Ellis children, some effort should have been made to appear and participate in the hearing which terminated the parental rights of Larry Ellis and his wife Mary, which proceedings resulted in the said children becoming wards of the County Department of Public Welfare. Plaintiffs failed to make any such objection.

It would also seem clear to this Court that any remedy contended for by the plaintiffs should have been presented to the Indiana Appellate Courts. The plaintiffs did not so appeal but instead chose to proceed with this cause as outlined above. It would seem clear under the Indiana law that the defendant Judge of the Putnam Circuit Court, having probate jurisdiction, has the absolute right to exercise his legal discretion in these adoption proceedings for the best interests of the four children. It would also seem clear that action terminating the parental rights would

create no additional right in the grandparents, as alleged here. Finally, it is clear that neither Zella nor Cyril Frazier would have any right as grandparents pertaining to the four Ellis children since, as noted, Larry Donovan Ellis was adopted in 1952 by Amy Frances Ellis.

Therefore, this Court now GRANTS the defendants' motion for summary judgment.

The process of adoption is clearly spelled out in Ind. Code §31-3-1-1 et seq. It vests the court having jurisdiction in probate matters with great discretion to act in a child's best interest. The statute confers no special rights upon grandparents. As the 7th Circuit Court of Appeals observed in Kyees (sic) v. Co. Dept. of Public Welfare of Tippecanoe Co., et al., 600 F.2d 693 (1979) in discussing adoptive rights of foster parents:

> "We see no property interest involved, and no fundamental rights wholly beyond the power of the state."

Id. at 697. In Indiana, as previously noted, the best interest of the child is the trial court's paramount concern. Unwed Father v. Unwed Mother, 379 N.E.2d 467, 472 (Ind. App. 1978). The responsibility for making the determination as to a child's best interests rests, under statutory authority, solely with the trial court, guided by factors set forth within the Adoption Act. Stout v. Tippecanoe County Dept. of Public Welfare, 395 N.E.2d 444, 448 (Ind. App. 1979). The discretion which attends such a determination is considerable, and its exercise, if within the bounds of established legislative and constitutional guidelines, should not be lightly set aside, either by state appellate proceedings or collateral attack under federal statutory provisions. In the present case it is clear to the Court that, insofar as the four Ellis adoptions are concerned, the trial court followed the dictates of Indiana law, concluding that

the best interests of the children would be served by placing them, with the consent of the Welfare Department, with their present foster families. This placement was accomplished prior to the filing of a proper petition by any of the plaintiffs herein. Although plaintiffs contend that the handling of their proposed petititons was in some way improper, the affidavit of defendant Hamilton satisfies the Court that, as submitted, the petitions were technically inadequate and the refusal to process them appropriate as a matter of law. In view of the trial court's knowledge of the background of the Ellis children, and the fact that none of the plaintiffs herein appeared at, or appealed the result of, proceedings terminating parental rights, making the children wards of Putnam County, or effectuating their adoption, the court's approval of the adoptions was neither an abuse of discretion nor a deprivation of plaintiffs' constitutional rights.

Insofar as the claimed visitation rights of the plaintiff grandparents are concerned, the Court has concluded that such rights do not exist under the facts or law of this case. It has long been clear that adoption acts to sever blood relationships for purposes of inheritance or intestate succession. See, e.g., In re Kenny's Estate, 153 N.E.2d 607, 611-12 (Ind. App. 1958). The situation in Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977), cited by the plaintiffs is simply not applicable to this case in which the principles and goals of adoption proceedings and a judicial determination of the best interests of minor children are involved. Although the Putnam County Welfare officials have not attempted to prevent visitation by the plaintiff grandparents, and although the parties remain free to devise an amicable visitation program, the plaintiffs may not, as a matter of law, disturb a legitimate adoption disposition under their theory of "grandparent rights." Upon the termination of parental rights and subsequent

court-approved adoptions, any legal rights which existed between the plaintiffs and the Ellis children were extinguished. Thus the defendants are properly entitled to judgment in their favor as a matter of law.

In accordance with the foregoing, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the defendants' motion for summary judgment be, and the same hereby is, GRANTED.

DATED this 19th day of December, 1980.

/s/ JAMES E. NOLAND, Judge

JAMES E. NOLAND, U.S. District Judge

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER, AND ZELLA FERN FRAZIER,
Petitioners,

v.

JUDGE OF THE PUTNAM CIRCUIT COURT, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 15, 1982

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ISSUES PRESENTED FOR REVIEW

The Respondents agree with the Petitioners' Issues Presented for Review as set forth on the first page of their Petition except that the Respondents do not agree with that portion of paragraph 3 of the Petitioners' Issues Presented for Review that refers to the Petitioners as *de facto* parents.

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No. 82-260

IN THE

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OCTOBER TERM, 1982

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JUDGE OF THE PUTNAM CIRCUIT COURT, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTION

The Respondents agree with the jurisdictional statement contained in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondents agree with the partial references by the Petitioners to the First and Fourteenth Amendment on page 2 of the Petition and to the provisions of 42 U.S.C.A. §1983.

STATEMENT OF THE CASE

Early in November of 1975, Judge Francis N. Hamilton of the Putnam Circuit Court received a phone call from the petitioner Amy Frances Ellis complaining about the fact

that her adopted son, Larry Donovan Ellis, and his wife were mistreating their four children, were leaving them alone and unattended for extended periods of time without sufficient food in the home and that said home was being maintained in a filthy and unhealthy state for such children. Judge Hamilton at that time directed the Putnam County Department of Public Welfare to conduct an investigation of the home and to maintain continuing supervision to determine whether or not the parents' conduct constituted a threat to the health and well-being of the four minor children.

Judge Hamilton also requested that the Office of the Prosecuting Attorney of Putnam County cooperate with the Department of Public Welfare, if in the opinion of such Department, prosecution would be warranted.

On March 19, 1976, the Prosecuting Attorney filed in the Putnam Circuit Court Criminal Cause No. CR 76-58 entitled "State of Indiana v. Larry Ellis and Mary Ellis". The affidavit was accompanied by a probable cause affidavit and after examining the probable cause affidavit and hearing evidence and after being duly advised in the premises, Judge Hamilton found that probable cause existed for the issuance of a warrant for the defendants Larry Ellis and Mary Ellis and such warrants were issued to the Sheriff of Putnam County, Indiana. (R. P. Affidavit of respondent Francis N. Hamilton, Judge of Putnam Circuit Court, pp. 111-116)

On March 22, 1976, Larry Ellis and Mary Ellis were brought into the Putnam Circuit Court and were advised fully as to their constitutional rights. At that time, they each voluntarily entered a plea of not guilty to the charge of cruelty and neglect to children and agreed to proceed with the trial of the cause. Larry Ellis stated to the Court that he would serve as his own counsel. The primary witness for the State of Indiana was Amy Frances Ellis, one of the Petitioners herein, and she testified at great length as to the

abuse of the children by their parents in her home over an extended period of time. The evidence disclosed that since January of 1976, Larry Donovan Ellis and his wife Mary had been residing in the home of petitioner Amy Frances Ellis with their four children and much of the observations testified to by the petitioner Amy Frances Ellis were observations made during the period of time that they were residents of her own home.

At the conclusion of the evidence, Judge Hamilton took the matter under advisement for sentencing. He ordered that the four children be made wards of the Putnam County Department of Public Welfare and that the Department of Public Welfare find suitable homes for the children and to expend such funds as may be necessary to provide for their care and maintenance and supervision and education. He ordered the two defendants to pay into the Office of the Clerk of the Putnam Circuit Court the sum of Sixty Dollars ($60) on each Friday thereafter for the support and maintenance of such children. Further, Judge Hamilton ordered the defendants Larry Ellis and Mary Ellis to remove their items of personal property from the home of the petitioner Amy Frances Ellis and had a police officer from the City of Greencastle accompany them to the home for that purpose and ordered them to remain away from the home of Amy Frances Ellis and not be around said home at any time. He further ordered them to furnish the Putnam County Department of Public Welfare with an address where they could be reached and directed the Putnam County Department of Public Welfare to furnish to the Court a home study of the home of Larry and Mary Ellis. The defendants were released on their own recognizance.

On July 8, 1977, the Putnam County Department of Public Welfare appeared in Judge Hamilton's Court with Larry Ellis and reported to the Court that on June 25, 1976, the Putnam County Department of Public Welfare had temporarily returned the children to the home of their

parents, Larry and Mary Ellis. Further, Larry Ellis advised the Court that his wife and the natural mother of the children had abandoned their home on July 7, 1977, and he specifically requested that the Court place Ann, age 6, and Larry, age 6, in the home of Zella Frazier and Twila, age 9, and Dawn, age 4 in the home of Amy Frances Ellis. At that time, Judge Hamilton ordered Larry Ellis to pay into the Office of the Clerk of the Putnam Circuit Court the sum of Eighty Dollars ($80) on each Friday thereafter for the support and maintenance of the minor children plus all reasonable and necessary medical, dental, optical, hospital, pharmaceutical expenses and support payments were ordered to be made also to Zella Frazier.

On August 18, 1977, the Putnam County Department of Public Welfare informed Judge Hamilton that the children had been placed in the Ladoga Christian Home and at that time, he ordered all support payments made payable to the Indiana Department of Public Welfare pursuant to Title IV-D Assignment.

On June 5, 1978, respondent Juanita Brooks, Child Welfare Worker for the Putnam County Department of Public Welfare, filed in the Putnam Juvenile Court her Petition to Terminate Parental Rights of Larry Ellis and Mary Ellis together with a non-resident affidavit. At that time, the whereabouts of both Larry Ellis and Mary Ellis were unknown and it was felt that they had removed themselves from the jurisdiction of the Court. Judge Hamilton ordered notice by publication and set the petition for hearing for June 30, 1978 at 9:00 A.M. Notice was published pursuant to Indiana law in the *Banner-Graphic*, a newspaper of general circulation in Putnam County, Indiana, with publications being had on June 12, 19 and 26, 1978.

Prior to the filing of such petition, attorney Judith T. Kirtland came to Judge Hamilton's office on May 31, 1978 and advised Judge Hamilton that she was representing

Amy Frances Ellis and Zella Fern Frazier. Judge Hamilton discussed with her the fact that the Putnam County Department of Public Welfare was going to file a Petition to Terminate Parental Rights as a preliminary matter to the adoption of the four Ellis children.

After filing of the petition as set forth above, Judge Hamilton had a further conversation with attorney Kirtland and she was informed that the petition was set for hearing on June 30, 1978. At that time, attorney Kirtland stated that she would inform Mrs. Ellis and Mrs. Frazier and that she and they would in all likelihood attend the hearing.

Neither Mrs. Kirtland nor Mrs. Ellis nor Mrs. Frazier attended the hearing; although Mrs. Ellis did call Judge Hamilton while the Petition to Terminate Parental Rights was pending and he did discuss the matter with her and again specifically informed her as to the time and date of the hearing. The petitioner Amy Frances Ellis stated to Judge Hamilton that she wanted the children to have a good home and that she hoped that she would be able to visit with the children. Judge Hamilton responded that that would be up to the adoptive parents.

Subsequent to the termination of parental rights, an adoption petition was presented to the Clerk of the Putnam Circuit Court on behalf of Amy Frances Ellis and Cyril Victor Frazier and Zella Fern Frazier seeking to adopt the four Ellis children. The petition was deficient in many ways and did not comply with the rules of the Court nor in Judge Hamilton's opinion, with the laws of the State of Indiana. Further, the attempt to file an adoption petition in the Office of the Clerk of the Putnam Circuit Court was violative of a long-standing rule of the Court which has always required adoption petitions to be filed in the Office of the Court Reporter on the third floor of the Putnam County Courthouse where said petitions are maintained away from the public records of the Clerk's Office so as to maintain and protect their confidentiality.

The day following the filing of such petition, Judge Hamilton called attorney Kirtland in her capacity as the petitioner's counsel and informed her that contrary to the rules of the Court, she had included all four children on one adoption petition and that she would have to file separate petitions for each child.

Further Judge Hamilton informed attorney Kirtland that her petition did not set forth all of the elements required to be found by the Court so as to enable the application to be made for a new birth certificate for the children. Judge Hamilton further informed attorney Kirtland that she had not accompanied her petition with any consents from the Putnam County Department of Public Welfare. He again informed attorney Kirtland that an adoption petition must be filed in the Court Reporter's Office and not in the Clerk's Office.

At the time such petition was filed on behalf of Mrs. Ellis and the Fraziers, the children were wards of the Welfare Department of Putnam County and the petitioner would have to have obtained the consent of the Welfare Department to the adoption of such children by the petitioners. He subsequently learned that the Welfare Department had already executed consents for the other adoptive parents to adopt each of the four children.

Subsequently, pursuant to the Order of the District Court, the Respondents filed a Motion for Summary Judgment accompanied by supporting affidavits.

The affidavits filed in opposition to the Motion for Summary Judgment were not filed until the morning that the Court had set for the hearing at 9:00 A.M. on October 27, 1981, (R. P., p. 275). The Respondents had had no opportunity to see or read the affidavits and while they made no objections to such affidavits, they were given thirty days to file additional pleadings, but having had an opportunity to examine the affidvits filed in opposition to the Motion for Summary Judgment, it was concluded by

Respondents' counsel that the facts contained in said affidavits were not germane to the issues raised by the Respondents' Motion for Summary Judgment, that being the standing of the Petitioners to bring the cause of action itself. While it does not appear in the Record, counsel for the Respondents so informed the Court and asked the Court to rule on the pending Motion for Summary Judgment.

Attorney Kirtland admits to having no personal knowledge of the previous attitudes of the Petitioners regarding their desires to have the Ellis children, but stated that at the time of her visit with the respondent Francis N. Hamilton in May of 1978, the Petitioners then decided that they wanted the children. (R. P., p. 169)

After admitting that she had been told on July 18, 1978 that all adoption petitions had to be filed with the Judge's Office and not with the Clerk's Office (R. P., p. 170), attorney Kirtland again on August 24, 1978, submitted her petition to the Clerk's Office with her cover letter of August 24, 1978. (R. P., p. 195)

Further, after being advised as to what the contents of the adoption petition should include (R. P., p. 172, ¶14 of Judith Kirtland's Affidavit in Opposition to Motion for Summary Judgment), attorney Kirtland subsequently ignored such directives from the Court and failed to include that information in the four adoption petitions she presented on July 18, 1978 (R. P., Petition Re: Larry Donovan Ellis, p. 182; Petition Re: Delta Dawn Ellis, p. 184; Petition Re: Twila Gail Ellis, p. 186; Petition Re: Kimberly Ann Ellis, p. 188).

The petitioner Ellis admits that she initiated the complaint that first resulted in the children being made wards of the Welfare Department on March 19, 1976, and that she was the principal State's witness against her adopted son and daughter-in-law at the criminal hearing held around March 22, 1976, in the Putnam Circuit Court (R. P., p. 208).

Petitioner Zella Fern Frazier admits being present at a hearing on March 22, 1976, in response to the complaints of petitioner Amy Frances Ellis and was present when the children were made wards of the Putnam County Department of Public Welfare. (R. P., p. 236)

The petitioner Cyril Victor Frazier admits knowing of the date of the hearing when the children were made wards of the Putnam County Department of Public Welfare, but denies being present at such hearing. (R. P., p. 248)

The petitioner Amy Frances Ellis was 72 years of age at the time this case was argued before the Seventh Circuit Court of Appeals based upon information set out in her petition to adopt two of the children. (R. P., Petition Re: Delta Dawn Ellis, p. 184; Petition Re: Twila Gail Ellis, p. 186)

Zella Frazier and Cyril Frazier, based upon the petition for adoptions filed on their behalf, was at the time of the argument of this case before the Seventh Circuit Court of Appeals, 58 or 59 years old and 69 or 70 years old respectively. (R. P., Petition Re: Kimberly Ellis, p. 188)

In their complaint which initiated these proceedings in the District Court, the Petitioners correctly stated that the petitioner Zella Frazier was the natural mother of Larry Ellis, the natural father of the four children in question, that she placed him for adoption in 1952 and that he was adopted by the petitioner Amy Frances Ellis.

The petitioner Cyril Frazier did not come on the scene until his marriage to Zella Frazier on January 5, 1969, some 17 years after Zella Frazier had given up her rights to her natural son Larry Ellis. (R. P., Petition Re: Kimberly Ellis, p. 188)

REASONS FOR NOT GRANTING THE PETITION

In this argument section, the Respondents will repeat the reason given by the Petitioners in support of the granting of

this petition and follow each one by Respondents' argument.

A. The Court of Appeals' Decision Creates a Rigid and Simplistic Rule for Deciding Whether Due Process Has Been Satisfied and is Therefore Contrary to this Court's Holding in *Matthews v. Eldridge*.

The Petitioners' position under this portion of their argument stands or falls upon this Court's interpretation of the case of *Matthews v. Eldridge*, 424 U.S. 319 (1976).

A careful reading of this case clearly shows that it involves a federal administrative proceeding brought under 42 U.S.C. §405(g) involving the appeal of a determination removing the plaintiff from Social Security disability benefits. Involving a federal administrative proceeding not in any way related to an action brought under 42 U.S.C. §1983, *Matthews v. Eldridge* must be confined to its narrow application and certainly not expanded to the instant case.

The Petitioners criticize the United States Court of Appeals for the Seventh Circuit by stating that in relying upon *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Ingraham v. Wright*, 430 U.S. 651 (1977), they have thus created an inflexible rule which obviates the need for the balancing test articulated in *Matthews v. Eldridge, supra.*

Such is simply not the case. In fact, the Court in *Ingraham* acknowledges and restates the balancing test referred to in *Matthews* and reaches the same result that the United States Court of Appeals for the Seventh Circuit reached in this case. *Ingraham v. Wright, supra*, p. 675. Among the cases cited under this section of the Petitioners' argument are the cases of *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977). They cite *Stanley v. Illinois* correctly for the proposition that parents are constitutionally entitled to a hearing on their fitness before their children are removed

from their custody. *Stanley* involves an Illinois law which did not include in the definition of parent an unwed father of an illegitimate child. In that case, the plaintiff had lived out of wedlock with the mother of the three children involved for 18 years and the children were born during that period of time. Upon the mother's death, under Illinois law, it was necessary to appoint a guardian for the children and they were removed from the plaintiff since he was not legally defined as a parent. One certainly cannot argue with the outcome in *Stanley* nor can one apply any of the principles of law in *Stanley* to the issues of the instant case. *Duchesne* can be distinguished as easily because it is an action brought by a natural mother.

The Petitioners continuously throughout this section of their petition bemoan the fact that they received no notice of the various judicial proceedings presumably including the criminal proceedings where the natural mother and father of these children were found to be guilty of child neglect, the subsequent proceedings to terminate the parental rights of the natural mother and father and the subsequent adoption proceedings of the four children by other parties.

Such is simply factually incorrect as to the first two hearings and in regard to those two hearings, the facts are not in dispute. The petitioner Amy Frances Ellis is the one who initiated the criminal proceedings against the natural mother and father of these children after she observed the children being abused over a long period of time while they were residing in her home with the parents. She was the State's key witness in the trial that resulted in their conviction.

It is again without conflict that an attorney by the name of Judith Kirtland, representing at that time Zella Frazier and Amy Frances Ellis, was specifically informed of the date and time of the hearing to terminate parental rights and was or, as an Indiana practitioner, certainly should

have been aware of the fact that that was a matter preliminary to adoption proceedings and Amy Frances Ellis herself was again advised of the specific date and time on the telephone by the respondent Judge Francis N. Hamilton. Neither Ms. Kirtland nor her two clients appeared at the hearing.

It is also without dispute that none of the Petitioners received any notice of the adoption proceedings whereby the four children were adopted by four separate families.

During the course of argument before the United States Court of Appeals for the Seventh Circuit, counsel for the Respondents was asked whether or not he knew of any adoption laws of any state requiring notice to grandparents or to persons who had supposedly developed warm and loving relationships with the children sought to be adopted. No such authority in any state has been found either through legislation or common law. The only notice requirements regard notice to the natural parents and that was provided in this case through publication since both natural parents, at the time of the adoptions, had left the state and their whereabouts were unknown. There is no allegation by the Petitioners of any impropriety or the violation of any Indiana law in regard to the adoption proceedings themselves and the way with which the natural parents were dealt.

It is obvious that the Respondent Judge met his judicial duty as outlined by Indiana law when he weighed and considered the interest of the absconding natural parents with that of the potential adoptive parents and balanced those interests against the child's best interest which he permitted to rule supreme. *Matter of Adoption of Hewitt*, ___ Ind. App. ___, 396 N.E.2d 938 (1979)

B. The Court of Appeals' Decision Requiring Petitioners to Exhaust Their State Judicial Remedies Conflicts with the Principles of *Patsy v. Florida Board of Regents*.

In this section of their argument, the Petitioners face the arduous task of convincing this Court that the opinion of the United States Court of Appeals for the Seventh Circuit decided this case on the basis that the Petitioners had not exhausted their state judicial remedies. A reading of the opinion of the United States Court of Appeals for the Seventh Circuit shows this simply not to be the case. The following language is found on page A-12 in the Appendix of the Petition:

> "We do not say that a section 1983 plaintiff must exhaust his state remedies before he can proceed in federal court. That would imply that if the plaintiffs here had assiduously but unsuccessfully pursued their remedies under Indiana law we could not reject their federal claims without a trial. The point, rather, is that there is no denial of due process if the state provides reasonable remedies for preventing families from being arbitrarily broken up by local domestic relations officers such as the defendants in this case. The courts of Indiana seem every bit as determined to prevent such wrongs as the federal courts would be. See *Matter of Adoption of Hewitt*, 396 N.E.2d 938 (Ind. App. 1979); *Matter of Joseph*, 416 N.E.2d 857 (Ind. App. 1981). Indeed, despite their dilatoriness, the plaintiffs in the present case still have remedies they can pursue under Indiana law. A motion by the plaintiffs to supplement the record on appeal advises us that in November of last year, the Putnam County welfare board filed a petition in the county court charging the adoptive parents of one of the plaintiffs' grandchildren with abuse and neglect of the child. The Fraziers have moved to intervene in the case and their motion is pending before that court. They have also moved the court, successfully, to order the child

> examined by a competent psychiatrist. These developments deepen our sympathy for their unfortunate family and bolster the plaintiffs' contention that the defendants have mishandled the whole business. But they also show that the plaintiffs really did, and still do, have remedies under Indiana law.
>
> The approach we take here, which considers the adequacy and availability *(not exhaustion)* of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law, is not a novelty in either property cases, see *Parratt v. Taylor*, 451 U.S. 527 (1981), or Liberty cases, see *Ingraham v. Wright*, 430 U.S. 651, 676-82 (1977)..."

Apparently the Petitioners have attempted to tailor their interpretation of the opinion of the United States Court of Appeals for the Seventh Circuit so as to bring it within the purview of the recent Supreme Court case of *Patsy v. Board of Regents of the State of Florida*, No. 80-1874, decided June 22, 1982.

The fact that *Patsy* does not apply to the instant case is made abundantly clear by the first sentence of the case, which reads as follows:

> "This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. §1983."

This Court correctly observed that it has stated categorically that exhaustion is not a prerequisite to an action under 1983, and that the Court has not deviated from that position in 19 years. The Court then held that it was not addressing this question as one of first impression.

It is significant to note that during this 19-year history, this Court also decided the cases *Parratt v. Taylor* (1981 *supra*) and *Ingraham v. Wright* (1977 *supra*). In *Parratt*, an inmate was suing a state official in the State of Nebraska because certain materials he had ordered had been

delivered in the mail and were lost because prescribed state procedures had not been followed. This Court first found that the plaintiff did have a property right which qualified him to bring a 1983 action against the state official. In its opinion, this Court acknowledged the apparent confusion of the lower courts on this issue and stated:

> "We, therefore, once more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." *Parratt v. Taylor, supra*, p. 533.

The Court then, observing that they must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivation satisfied the requirements of procedural due process went on to find that the State of Nebraska did in fact have a tort claims procedure which provided a remedy to persons who suffer tortious losses at the hands of the state.

Also, in his concurring opinion, Justice Stewart stated:

> "But even if Nebraska has deprived the respondent of his property in the constitutional sense, it has not deprived him of it without due process of law. By making available to the respondent a reparations remedy, Nebraska has done all that the Fourteenth Amendment requires in this context." *Parratt v. Taylor, supra*, p. 545.

As stated above, during this same 19-year history, this Court decided the case of *Ingraham v. Wright, supra*. This involved an action brought under §1983 by the parents of two students in the Dade County Florida Junior High School resulting from injuries sustained by them during the course of the administration of corporal punishment by school officials.

In its opinion, this Court stated:

> "The Fourteenth Amendment prohibits any state deprivation of life, liberty or property without due

> process of law. Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment protection of 'life, liberty or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law'. (underscoring added) Citing *Morrissey v. Brewer*, 408 U.S. 481, 33 L.Ed.2d 484, 92 S.Ct. 2593; *Board of Regents v. Roth*, 408 U.S. 564, 569-572, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972)" *Ingraham v. Wright, supra*, p. 672.

After deciding that corporal punishment in a public school did involve an interest encompassed within the Fourteenth Amendment protection of life, liberty and property, the Court then turned to the second test and found that the State of Florida provided adequate due process for children abused through unreasonably severe corporal punishment.

This Court then concluded that:

> "The Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common law constraints and remedies." *Ingraham v. Wright, supra*, p. 683. See also *Allen v. McCurry*, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980).

Thus, the United States Court of Appeals for the Seventh Circuit did not, as asserted by the Petitioners, decide this case on the basis that the Petitioners had not exhausted their state remedies, but rather on the basis that the State of Indiana provided numerous remedies set out in the opinion of the Court, which satisfied the Fourteenth Amendment's requirements. The Court very carefully followed the history of the treatment of this area by this Court.

The *Patsy* opinion is distinguishable not only because it involves solely an appeal from an state administrative

proceeding and should be confined to such instances, but also it must be considered that the *Patsy* case involved a suit by a disgruntled employee engaged in administrative proceedings against her employer and claiming lack of promotion based upon sex discrimination while the instant case is a domestic relations matter involving the custody, family relationship and stability of the lives of four minor children. Such cases should not be decided on the same basis as the facts in *Patsy* or other cases involving criminals attempting to get out of prison through habeas corpus proceedings or suing the police officers who arrested them. The standards by which the facts in the instant case should be judged are best set out in the case of *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978).

This Court in *Patsy* conducted an extensive study of the legislative history of §1983 observing that it was a part of the 1871 Civil Rights Act. At page 8 of the opinion, the court observes as follows:

> "A major factor motivating the expansion of federal court jurisdiction through Sections 1 and 2 of the Bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Patsy v. Board of Regents of the State of Florida, supra.*

The Respondents do not urge this Court to abandon its position that administrative remedies need not be exhausted prior to pursuing 1983 rights. The Respondents do respectfully request that this Court recognize that, based upon this Court's own authority, the Seventh Circuit did find not an exhaustion of remedies problem, but that the State of Indiana provides the Petitioners with adequate remedies which satisfy the due process requirements of the Fourteenth Amendment and, as stated in the opinion of the Court, the state exhibits a desire to protect this right equal to that of the federal courts.

C. This Case Presents an Opportunity to Determine Whether Relatives Acting as Long-Term *De Facto* Parents Have a Constitutionally Protected Liberty Interest in Maintaining the Integrity of Their Families

The Respondents strongly disagree with the characterization of the Petitioners as "relatives acting as long-term *de facto* parents" and question the Petitioners' authority cited in support of this third argument.

For example, the Petitioners cite the case of *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). This case involves litigation brought by two female school teachers against their Board of Education challenging a rule of the Board requiring pregnant teachers to commence maternity leave five months before the delivery date of their children and to give notice at least two weeks prior to that. The leave was without pay and the policy provided that the teachers could not become eligible for re-employment until the beginning of the next school semester following their child attaining the age of three months. Petitioners' quote from page 20 of their Petition, which states:

> "This Court has long recognized that 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'"

constitutes six lines in a 20-page opinion that in no way is related to the facts of this case or to this third issue raised by the Petitioners. The Court found in *Cleveland Board of Education v. LaFleur* that the mandatory termination provision was in fact unconstitutional, but again that has no application to the issues before the Court in this Petition.

It is also interesting to note that Petitioners also have cited the case of *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) for the proposition that there is a "private realm of family life which the state cannot enter". In *Prince*, an aunt

who was also custodian of her niece was appealing her conviction under a Massachusetts child labor law prohibiting children under a certain age from selling or exercising any trade in any street or public place in the State of Massachusetts. The statute imposed a penalty on anyone who encouraged children to engage in such conduct. The aunt and her niece were distributing and selling religious material at night time on a public street and the aunt was convicted by the Massachusetts state court. Upon reviewing the case, this Court stated:

> "It is the interest of youth itself and of the whole community that childen be both safeguarded from abuses and given opportunities for growth into free and independent, well-developed men and citizens." *Prince v. Massachusetts, supra*, p. 165.
>
> "but the family itself is not beyond regulation in the public interests." *Prince v. Massachusetts, supra*, p. 166
>
> and
>
> "The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."

The Court in *Prince* then went on to uphold the constitutionality of the Massachusetts child labor law and the conviction of the aunt for violating it and thus, *Prince* is far more supportive of the Respondents' position than it is of the Petitioners'.

Among other cases relied upon by the Petitioners is *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which was a case where this Court struck down as unconstitutional an East Cleveland ordinance which prohibited grandparents from living with their grandchildren. Again there is no connection between *Moore* and the instant case.

It is clear from the facts as alleged in Petitioners' Petition that Amy Frances Ellis became the adoptive mother of Larry Donovan Ellis in 1952. It is equally clear that any parental right that Zella Fern Frazier or Cyril Victor Frazier through her, may have had in Larry Donovan Ellis were terminated in 1952. A decree of adoption severs forever every part of the parent-child relationship. In such an instance, the parent loses the right to see or visit with the child or to even have any knowledge of his whereabouts. *Bristow v. Konopka*, 166 Ind. App. 357, 336 N.E.2d 397 (1975).

For all legal and practical purposes, an adopted child is the same as dead to its parents. *In Re The Adoption of Bryant*, 134 Ind. App. 480, 189 N.E.2d 593 (1963); also see, IND. CODE 31-3-1-9 (1976). Thus, any right of the petitioner Zella Fern Frazier to a relationship with any offspring of Larry Donovan Ellis or with Larry Donovan Ellis himself terminated in 1952 at the time of his adoption by Amy Frances Ellis.

If the effect of the adoption is to sever the child completely from its natual family and graft it on to the adoptive family, then the relationship between the child and all members of its natural family must be severed, not just between the child and its natural parents. Thus, the lawful adoption of the four Ellis children as described in the Affidavits in support of the Respondents' Motion for Summary Judgment severed any legal relationship between the petitioner Amy Frances Ellis and such children. This logic is supported by the Indiana Court of Appeals in an opinion handed down in a case entitled *In Re Kenny's Estate*, 129 Ind. App. 199, 153 N.E.2d 607 (1958); transfer denied 129 Ind. App. 199, 239 Ind. 142, 155 N.E.2d 389.

In *Kenny*, a granddaughter, who had been adopted as a minor, attempted to inherit from the natural paternal grandfather who died intestate subsequent to the adoption.

After referring to the applicable statute on page 611 of the opinion, the Court states as follows:

> "It seems clear from the language employed by the legislature in said sub-section, and in the manner of statement thereof, that for the purposes of intestate succession, the blood line between a child adopted during its minority and its natural relative is completely severed, except under the conditions found in the proviso to said sub-section. First, the sub-section contains a positive mandate that the adopted child *shall be treated as the natural child* of the adopters; and second, it contains an equally positive desist against treating the adopted child as the child of its natural parents. The word 'treated', as here used, seems to be synonymous with such words as 'considered', regarded', 'dealt with', etc.
>
> The statute, as drawn and worded, leaves no discernible opening for conditional interpretation. In effect, it provides that when a minor child is adopted, it is no longer the child of or in the blood line of its natural parents for the purpose of any possibility of intestate inheritance. The natural ties of affection and interest between the adopted minor child and its blood relatives are not and, of course, cannot be affected by this statute. But for the purpose of intestate succession, the child is freed from his former blood relationship status and is established in a new status as a member of a new family with full standing as one of its blood. Other than the conditions provided in the proviso to said sub-section and the fact that the child must be 'legally' adopted, no observable way to avoid the declared status of the minor adopted child is found." *In Re Kenny's Estate, supra,* pp. 611-2 (emphasis in original quoting material)

In this instance, the Respondents complied completely with Indiana law.

In their Memorandum, in their Pre-Trial Brief and Memorandum of Law filed with their original complaint,

the Petitioners relied almost solely upon four cases to support their contention that the Petitioners have a right to participate in the nurturing and development of their grandchildren now adopted out to other adoptive parents. These are the cases of *Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir. 1977); the case of *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 396, 28 L.Ed.2d 113 (1971); *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1976); and *Moore v. The City of East Cleveland*, 431 U.S. 494, 97 S.Ct. ____, 52 L.Ed.2d 531 (1977) (previously distinguished).

The *Boddie* case involved female welfare recipients who brought a class action and were successful in striking down a Connecticut state law requiring them to pay filing fees and court costs before they could get their divorces as being an unconstitutional denial of due process to indigent persons. *Bodie v. Connecticut, supra.*

Procunier strikes down a mail censorship regulation in a California state prison as being violative of the First Amendment. *Procunier v. Martinez, supra.*

Drollinger is a case involving a challenge by a child's mother and the child's paternal grandfather to the terms of probation set down by the Montgomery County, Indiana Circuit Court as a result of the criminal conviction of the child's mother. In essence, the complaint centered around the fact that the terms of probation would deprive the paternal grandfather of the right to visit with his grandchild. In *Drollinger*, there was no adoption involved and the action of the Montgomery County, Indiana Circuit Court did in fact deprive the actual grandfather of such visitation rights with the child who was still his natural grandchild. The attempt of the Petitioners to expand *Drollinger* to the facts of this case is unwarranted and would if supported by this Court, truly open a Pandora's box that would totally destroy the adoption process in this and other states.

If *Drollinger* could be expanded so as to permit a grandparent to set aside an otherwise legal adoption for the reason that it deprived her of the right to consortium and a relationship with her grandchildren (when such right was terminated by the very adoption she is challenging), then we could also look for a second cousin to bring such an action to set aside an adoption for the deprivation of his right to a second cousin relationship with the adoptive child and on down the line, *ad infinitum*. It would soon become impossible to provide notices to all of the persons whose relationship will be severed by the adoption proceedings and thus, impossible to carry out any further adoptions whatsoever.

The Petitioners have continually attempted to depict themselves as *de facto* parents with long-time associations with these four unfortunate children. However, they concede that the natural mother and father of the four children resided for a temporary period of time in the home of the petitioner Amy Frances Ellis and that during that period of time, she caused the criminal proceedings to be brought against her adopted son, the natural father of these four children, for child neglect, which occurred in her home and one of the complaints was the condition of the home and as a result of the actions initiated by her, the children were made wards of the Putnam County Department of Public Welfare.

As the Petitioners admit in their statement of the case, the children were briefly returned to the natural parents, apparently on a trial basis, and this association was terminated when the mother abandoned the home and the father voluntarily turned the children over to the Petitioners and then disappeared himself. It is also conceded by the Petitioners that the children remained in the homes of the Petitioners for only 30 days and while there is no evidence in the record as to what the Welfare Department was doing for a period of 30 days, it is

submitted to this Court that it is certainly logical to assume that they spent that time looking for proper placements for these children so that they eventually would be put in a position where they would have the opportunity for growth and to become free and independent, well-developed men and women and citizens as this Court recommended in *Prince. Prince v. Massachusetts, supra.*

Clearly in this instance, the Respondents were merely following the dictates of the law and were acting in the best interests of the children which must be the Respondents' paramount concern. *Unwed Father v. Unwed Mother,* 379 N.E.2d 467, 472 (Ind. App. 1978).

CONCLUSION

For the reasons set forth above, the Court should not grant the Petition for a Writ of Certiorari, but rather should deny the same, sustain the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

J. D. Calbert, being duly sworn upon his oath says that he is one of the attorneys for the respondents Judge of the Putnam Circuit Court, Clerk of Putnam Circuit Court, Cecil Sutton, Helen Hurst, Donald Crosby, Rita Garrett and Janet Lane, as Members of Putnam County Department of Public Welfare, Gerald V. McCord, individually and as Director of the Putnam County Department of Public Welfare and Juanita Brooks, individually and as Child Welfare Worker, and that he deposited in the United States mail, postage prepaid and properly addressed three copies of Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to Ralph Ogden and M. Anne Wilcox of the firm of Wilcox, Ogden & DuMond, 1122 Circle Tower Building, 5 East Market Street, Indianapolis, Indiana 46204 this 12 day of November, 1982.

J. D. Calbert

J.D. Calbert

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Before me, the undersigned Notary Public in and for and residing in said County and State, personally appeared J. D. Calbert, who acknowledged the execution of the foregoing Certificate of Service.

In Witness Whereof, I have hereunto subscribed my name and affixed my Official Seal this 12 day of November, 1982.

My Commission expires: Jan 13, 1984

Vera L Mikkelsen

Notary Public

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ALEXANDER L. STEVAS,
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No. 82-260

In the

Supreme Court of the United States

OCTOBER TERM, 1982

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER, AND ZELLA FERN FRAZIER,
Petitioners,

v.

JUDGE OF THE PUTNAM CIRCUIT COURT, et al.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 24, 1982

Central Publishing Company, Inc., Indianapolis, IN 46206

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that petitioners were not deprived of a constitutionally protected liberty interest without due process of law solely because after the deprivation had been consummated, the state allowed them to bring suit in its courts for redress, or whether the Court of Appeals should have applied the balancing test set forth in *Matthews v. Eldridge* to determine whether due process had been provided.

2. Whether, in light of *Patsy v. Florida Board of Regents*, the Court of Appeals correctly required petitioners to exhaust their state judicial remedies before bringing suit in federal court under 42 U.S.C. §1983.

3. Whether petitioners, as relatives and long-term *de facto* parents of four children, had a constitutionally protected liberty interest in maintaining the integrity of their families.

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARGUMENT IN REPLY

A. The Court of Appeals' Decision Was Not Correct Simply Because It Reached the Same Conclusion As *Parratt v. Taylor* and *Ingraham v. Wright*

Respondents argue that the Seventh Circuit's decision is correct solely because it reached the same conclusion as *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Ingraham v. Wright*, 430 U.S. 651 (1977). They do not, however, address

the lower court's failure to analyze the competing interests and procedural alternatives within the factual context of the case. Nor do they address the significant factual differences between this case and *Parratt* and *Ingraham*.

Matthews v. Eldridge, 324 U.S. 319 (1976) established a three-part balancing test for determining whether a person had been deprived of liberty or property without due process of law. This test has been applied in every due process decision since *Matthews*, including *Parratt* and *Ingraham*. It was nonetheless rejected by the Seventh Circuit when it held that due process was satisfied solely because Indiana provided petitioners with adequate post-deprivation remedies through its judicial system.

In their Petition for Certiorari,[1] petitioners discussed the ramifications of the Seventh Circuit's abandonment of the *Matthews* test and that discussion need not be repeated here. It is sufficient to note that if the Seventh Circuit is correct, the continuing viability of *Matthews v. Eldridge* and most of this Court's due process decisions since 1976 is in serious doubt.

B. In Holding That Petitioners Were Not Denied Due Process of Law Because They Had Adequate Post-Deprivation Remedies, The Court of Appeals Required Them to Exhaust Their State Remedies

Monroe v. Pape, 365 U.S. 167 (1961) held that the federal remedy for constitutional violations was supplementary to any state remedy for the same misconduct, and that "the latter need not be first sought and refused before the federal one is invoked." *Id.* at 365 U.S. 183. Because the federal remedy is supplementary, the existence or non-existence of state remedies is therefore irrelevant to the question of whether there has been a deprivation of liberty or property without due process of law.

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[1]Petition, at pp. 12-17.

Both *Parratt* and *Ingraham* appear to be exceptions to this rule, because in each case the Court found that adequate post-deprivation remedies were all that due process required. These cases differ significantly, however, from the Court's other due process decisions and from the case at bar, because they involve negligent or unpredictable violations, rather than intentional, premeditated misconduct.[2]

This distinction has been recognized by the Seventh Circuit on two occasions, one before and one after *Parratt*. In *Kimbrough v. O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc) and *Madyun v. Thompson*, 657 F.2d 868, 873 (7th Cir. 1981), the Court held that an intentional deprivation of property stated a cause of action under 42 U.S.C. §1983, even though the plaintiff had adequate state procedural remedies to obtain the same relief.

Virtually all of the district courts which have considered this question after *Parratt* have reached the same result. *See, e.g., Pantoja v. City of Gonzales*, 538 F.Supp. 335 (N.D. Cal. 1982); *Howse v. DeBerry Correctional Institute*, 537 F.Supp. 1177 (M.D.Tenn. 1982); *Peters v. Township of Hopewell*, 534 F.Supp. 1324 (D.N.J. 1982) *Parker v. Rockefeller*, 521 F.Supp. 1013 (N.D.W.Va. 1981);

[2] *Ingraham* has also been cited for the proposition that where the constitutional violation is *de minimus*, due process requires nothing more than the availability of adequate post-deprivation remedies in the state judicial system. *See, e.g., Monsanto Company v. Kennedy*, 613 F.2d 947, 955 (D.C.Cir. 1979); *Martinez v. Posado*, 474 F.Supp. 758, 760 n. 8 (S.D.N.Y. 1979)

Tarkowski v. Hoogasian, 532 F.Supp. 971 (N.D.Ill. 1982);[3] *Sager v. City of Woodland Springs*, 543 F.Supp. 282, 293 n. 12 (D.Colo. 1982); and *Abraham v. County of Washoe*, 547 F.Supp. 548 (D.Nev. 1982). *Contra, Waterstraat v. Central State Hospital*, 533 F.Supp. 274 (W.D.Va. 1982) *Sheppard v. Moore*, 514 F.Supp. 1372 (M.D.N.C. 1981); *Spriggs v. City of Chicago*, 523 F.Supp. 138, 143, n. 5 (N.D.Ill. 1981).

Parratt and *Ingraham* thus constitute a narrow exception to *Monroe v. Pape*, and allow the consideration of state remedies only where the deprivation was *de minimus*, unpredictable, or negligent.[4]

In the case at bar, petitioners alleged that respondents acted intentionally.[5] Nonetheless, the Seventh Circuit held that due process was satisfied solely because Indiana allowed petitioners the post-deprivation right to sue for redress in its courts. It thus expanded the narrow holdings of *Parratt* and *Ingraham* far beyond their facts, and eviscerated the general rule that post-deprivation state remedies are irrelevant in determining whether due process has been provided.

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[3]Senior District Judge Hubert Will sat by designation on the Seventh Circuit panel which decided this case below, and concurred in Judge Posner's opinion. Two weeks later, he sat as a district judge and decided *Tarkowski v. Hoogasian*, 532 F.Supp. 791 (N.D.Ill. 1982). There, he wrote a scholarly opinion in which he cited both *Kimbrough v. O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc) and *Madyun v. Thompson*, 657 F.2d 868, 873 (7th Cir. 1981) for the proposition that where the deprivation was intentional, the adequacy of post-deprivation state remedies was not relevant. His opinion in *Tarkowski* was in direct conflict with his concurrence in this case, and may be indicative of the confusion in the lower courts about the true meaning of *Parratt v. Taylor*.

[4]Their amended complaint, which the district judge would not approve for filing, alleged that respondents acted deliberately and maliciously, and accordingly sought punitive damages.

[5]*Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. granted*, No. 81-1055, held that *Parratt* applied only to procedural due process, and was inapposite where substantative rights were at issue. *See, also, Hall v. Tawney*, 621 F.2d 607, 611-613 (4th Cir. 1980).

CONCLUSIONS

For the reasons set forth above and in the Petition for Certiorari, the petition should be granted to review the erroneous decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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